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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
WITH TABLES OF CASES REPORTED AND CITED, AND
STATUTES CITED AND CONSTRUED,
AND AN INDEX.

GEO. W. SELF,
OFFICIAL REPORTER.
SOL. H. ESAREY, Assistant Reporter.

VOL. 37.

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1905, NOT
REPORTED IN VOLUME 36.

INDIANAPOLIS:
ARTNA PRINTING COMPANY, CONTRACTOR FOR THE STATE
1907.

Entered, according to Act of Congress, in the year
one thousand nine hundred seven,

BY FRED A. SIMS,

SECRETARY OF STATE OF THE STATE OF INDIANA.

In trust for the benefit of the State of Indiana, in the office of the
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JUL 22 1907

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FRANK S. ROBY.†§
HON. WOODFIN D. ROBINSON.||
HON. DAVID A. MYERS.‡
HON. JAMES B. BLACK.||
HON. DANIEL W. COMSTOCK.||
HON. ULRIC Z. WILEY.||

†Chief Judge at November Term, 1905.

||Elected in 1896, reelected in 1898 and 1902.

§Appointed March 21, 1901; elected in 1902.

‡Appointed October 18, 1904; elected in 1904.

OFFICERS
OF THE
APPELLATE COURT

ATTORNEY-GENERAL
CHARLES W. MILLER.

REPORTER
GEO. W. SELF.

CLERK
ROBERT A. BROWN.

SHERIFF
MICHAEL McGUIRE.

LIBRARIAN
OMAR O'HORROW.

In Memoriam

May It Please the Court:

On behalf of the Indiana University School of Law I present this memorial of the life of the Honorable George L. Reinhard, for years dean of said school of law.

George Louis Reinhard was born in Bavaria, Germany, July 5, 1843, and died at his home in Bloomington, Indiana, July 13, 1906. He came to this country when a boy, bringing with him the industry, frugality and love of liberty characteristic of his race. Richly endowed with the genius, labor, his early struggles only served the better to fit him for the high duties that afterwards came for him to discharge. He served four years in the Union army in the war of the rebellion, all the time serving in the ranks as a private.

From 1866 to 1868 he was a student at Miami University and was honored by that institution with the degree of LL.D. in 1897.

After the war he studied law and was admitted to the bar in Kentucky in 1869, though afterwards he removed to Rockport, Indiana, where he established himself in a lucrative practice, and was honored by his neighbors and friends by twice being elected prosecuting attorney, and afterwards judge of the circuit court. While serving in these capacities he wrote an admirable text-book on Criminal Law.

He served as judge of the Appellate Court of this State from 1892 to 1897, and his opinions from the bench, reported in the first sixteen volumes of the reports of the Appellate Court, are the emanation of a strictly judicial mind.

In 1903 he issued a text-book on Agency, a model of research and conciseness of expression. At the time of his

IN MEMORIAM.

death he left completed manuscript for two books—The Common Sense Lawyer and a case book on Agency. His "Common Sense Lawyer" was based on the law of Indiana, and was prepared to meet the demands of the mechanic, the farmer, the tradesman and all who were not gifted in the science of the law, but who should understand some of their most elementary rights and remedies.

Before the end of his term as judge of the Appellate Court he was elected professor of law in the Indiana University School of Law, and took up his active duties as such with the beginning of 1897, since which time he has been closely identified with the law school, as professor up to 1902, and since 1902 as professor and dean of the school of law and vice president of the university.

As a lawyer he was careful and conscientious; if not eloquent, he was earnest and convincing.

As a circuit judge he was just; and though dignified, he was courteous and kind at all times.

As judge of the Appellate Court of Indiana, his record was clean and his work was of a high character, his decisions ranking with those of the ablest jurists the State has produced.

As a professor of law his personality was such that the respect of the student was given at once and always maintained.

As dean of the school of law he labored diligently to upbuild the school—to put it upon the plane with the best schools of the country. He loved a hard-working student no matter what his degree or station in life. To the members of the law faculty he was always kind and considerate; he desired their hearty coöperation and had their entire confidence.

In all the relations of life he was earnest, honest, sincere and capable; there was never a blemish on his name, and he singularly endeared himself to all those who were brought within the sphere of his personal acquaintance.

IN MEMORIAM.

Modest, diffident and retiring by nature, in the defense of what he considered right he was bold, unyielding and forceful; gentle and kind as a woman, he was firm as the rock of Gibraltar and as inflexible as granite in what he believed to be right. Learned as a lawyer, great as a citizen, lovable as a man, we honor him most because of his fidelity to the great principles of true citizenship. This tribute of esteem but feebly expresses the feeling of our hearts. We mourn his death, and we shall always cherish his example as a bright heritage of the profession.

I move that the memorial herewith be ordered spread upon the records of this court as an enduring tribute to the life and services of our friend and instructor.

(Presented by Enoch G. Hogate.)


RESPONSE BY CHIEF JUDGE.

The law of life and death is inexorable. The strong, the brave, the learned and the just, are its subjects.

Judge Reinhard leaves a worthy record. Known and respected in life, he is missed and lamented now, and will be remembered so long as the law literature of Indiana exists.

The memorial is ordered to be spread of record and printed in the current volume of reports.

February 12, 1907.



CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1905, IN THE
NINETIETH YEAR OF THE STATE.

GODMAN *v.* HENBY.

[No. 5,504. Filed December 12, 1905.]

1. **TRIAL.**—*Bills and Notes.*—*Burden of Proof.*—*Non est Factum.*—Where defendant pleads *non est factum* to an action on a promissory note, the burden of proof as to the execution of such note remains at all times upon the plaintiff. p. 2.
2. **BILLS AND NOTES.**—*Execution.*—The execution of a note includes a signing of such note and a delivery to the payee with intent to transfer title and an acceptance by the payee with intent to receive title. p. 2.
3. **SAME.**—*Negotiables.*—*Innocent Holder.*—*Non est Factum.*—The defense of *non est factum* is available in favor of the maker of a note, negotiable as an inland bill of exchange, as against an innocent holder for value, before maturity. p. 3.
4. **SAME.**—*Delivery.*—*Evidence.*—Where the evidence shows that the maker of a negotiable note signed such note and acknowledged the execution of a chattel mortgage securing same before a notary; that she returned to her home and locked same in her drawer; that the payee, without her knowledge or consent, unlocked such drawer and took same and refused upon her demand to return same, no delivery is shown. p. 3.

From Madison Circuit Court; *John F. McClure*, Judge.

Suit by Elijah A. Henby against Georgie A. Godman.
From a decree for plaintiff, defendant appeals. *Reversed.*
Ed. F. Daily, for appellant.

BLACK, P. J.—The appellee sued the appellant upon a promissory note governed by the law merchant, alleged to

have been made by the appellant to John W. Card, and by him indorsed in writing on the back thereof before maturity, for a valuable consideration, to the appellee, and to foreclose a chattel mortgage given to secure the payment of the note. The appellant answered by a general denial and filed a sworn answer denying the execution by her of the note and mortgage.

The question whether the findings in favor of the appellee were sustained by sufficient evidence is presented here, and it is contended on behalf of the appellant that the evidence does not show the delivery of the note and mortgage by the appellant to the payee and mortgagee.

The execution of the note and mortgage having been denied under oath, the burden of proving the execution thereof was upon the appellee throughout the trial.

1. *Carver v. Carver* (1884), 97 Ind. 497, 511; *Wines v. State Bank* (1899), 22 Ind. App. 114; §367 Burns 1901, §364 R. S. 1881.

It was proved without conflict that the appellant signed the note and mortgage and acknowledged the execution of the mortgage before a notary public, and that it was recorded, though there was conflict in the evidence as to when and where and in whose presence they were signed.

The execution included both signing and delivery, and the burden was on the appellee to prove delivery; that is, the purposed transfer of the possession of the note

2. and mortgage by the appellant to the payee and mortgagee with intent on the part of the appellant to transfer the title thereto, and the acceptance of the note and mortgage by the payee and mortgagee with intent to receive the title thereto. This is familiar elementary law. *Ketcham v. New Albany, etc., R. Co.* (1856), 7 Ind. 391; *Prather v. Zulauf* (1871), 38 Ind. 155; *Cline v. Guthrie* (1873), 42 Ind. 227, 13 Am. Rep. 357; *City of Evansville v. Morris* (1882), 87 Ind. 269, 44 Am. Rep. 763; *Ricketts v. Harvey* (1881), 78 Ind. 152; *Nicholson v. Combs* (1883),

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90 Ind. 515, 46 Am. Rep. 229; *Elliott v. Champ* (1883), 91 Ind. 398; *Stringer v. Adams* (1884), 98 Ind. 539.

It is settled as the law in this State that in an action upon a promissory note payable at a bank in this State, and therefore negotiable according to the law merchant,

3. brought by a *bona fide* holder, to whom it was indorsed for value before maturity, against the maker, the execution of the note by the defendant may be thus put in issue, and in such case there can be no recovery by the plaintiff without sufficient evidence of the delivery of the note by the maker, the want of the delivery rendering the note void in its inception. See *Cline v. Guthrie*, *supra*; *Palmer v. Poor* (1889), 121 Ind. 135, 139, 6 L. R. A. 469. See, also, *Lindley v. Hofman* (1899), 22 Ind. App. 237.

The evidence was such that if the action were one brought by the payee against the maker, it would sustain a finding that at the date of the note and mortgage

4. the maker was indebted to the payee in the amount stated therein for borrowed money. It would also, if the action were one brought by the payee, be sufficient to sustain a finding that the maker has a valid set-off for the amount of the note or more, for boarding. There was evidence tending to prove that the appellee was a *bona fide* holder for value, the note and mortgage having been indorsed to him by the payee the day before maturity. There was evidence to the effect that the payee wrote the note and mortgage at the appellant's home, and afterward the appellant took them to the office of her attorney and there acknowledged the execution of the mortgage before a notary public, the attorney being absent; that she took the papers back to her home, and refused to deliver them to the payee until she should thereafter consult her said attorney on his return; that she thereupon placed the papers in a drawer of her desk and locked the drawer, of which the payee did not have a key; that they were taken from this drawer without her knowledge or consent by the payee, and she, having discovered their absence from the drawer, spoke of

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the matter to the payee, who admitted that he had taken them; that the appellant demanded the return of the papers to her, and the payee promised to return them, but did not do so. There does not appear to have been any evidence in contradiction of this evidence as to the manner in which the papers came into the possession of the payee. It may be true that the unexplained possession of the note by the appellee and the acknowledgment and recording of the mortgage would constitute *prima facie* evidence of their delivery; but such possession and acknowledgment and recording were all consistent with the facts affirmatively in evidence showing the manner in which the possession of the papers changed from the appellant to the payee. A letter written by the appellant to the payee was introduced, in which she stated her inability to pay the note, and requested him to purchase back the note, and said she did not wish him to lose that money, and did not intend that he should do so, and offered to give him a new note, and in effect promised to pay him, but there was nothing in the letter contradictory to her testimony above stated, as to the manner in which the payee had obtained the papers. The suit was upon the written instruments, and the burden, as already stated, was upon the appellee. We have each read the entire evidence carefully, and have been unable to find any sufficient evidence of delivery. See *Hatton v. Jones* (1881), 78 Ind. 466; *Stokes v. Anderson* (1889), 118 Ind. 533, 4 L. R. A. 313; *Purviance v. Jones* (1889), 120 Ind. 162, 16 Am. St. 319. .

Judgment reversed. Cause remanded for a new trial.

HUNTINGTON LIGHT & FUEL COMPANY v. BEAVER.

[No. 5,154. Filed April 4, 1905. Rehearing denied June 28, 1905. Transfer denied December 12, 1905.]

1. PLEADING. — *Complaint.* — *Negligence.* — *Gas Explosions.*—A complaint showing that defendant gas company in turning on plaintiff's gas discovered a leak between the house valve and

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the street valve; that defendant in turning off such gas preparatory to repairs turned off the house valve instead of the street valve; that the plumber, thinking that such company had turned off the gas at the street valve, began his work of repairs and in some manner unknown to the plaintiff occupant, the gas exploded, causing injuries to plaintiff, shows that such defendant was guilty of negligence. p. 9.

2. **NEGLIGENCE.—Proximate Cause.—Anticipation of Injuries.**—Actionable negligence must be such that an ordinarily prudent person would anticipate that some person in the exercise of a legal right might be injured thereby, and not that the precise injury sued for should happen. p. 10.
3. **SAME.—Proximate Cause.—Gas Explosion.**—Where plaintiff, the tenant of a house, requested defendant gas company to turn on the gas, and defendant after turning on the street valve discovered a leak between such valve and the house valve, and then turned off the house valve awaiting repairs by the owner, the fact that the plumber ignited the leaking gas inadvertently does not prevent defendant's liability, since where injury results from two negligent acts, both actors are liable. p. 10.
4. **SAME.—Turning on Gas.—Leaks.—Failure to Turn Off.**—Where a gas company turns on its gas with the knowledge that the plumbing has lately been tested and found safe, but such company ascertains that there is a leak therein, a failure by such company to turn off such gas constitutes negligence. p. 11.
5. **TRIAL.—Answers to Interrogatories.—Gas Explosions.**—Where the answers to interrogatories to the jury show that defendant gas company turned on the tenant's gas, discovered a leak, failed to turn off the gas, notified tenant to let it alone and defendant would repair it, and that the owner's plumber, without the tenant's knowledge, undertook to repair the plumbing, and in doing so ignited the gas, injuring tenant, the general verdict for tenant is not thereby overthrown. p. 13.
6. **SAME.—Answers to Interrogatories.—Failure to Show by Whom Gas Was Ignited.**—Where the answers to interrogatories to the jury show that defendant gas company negligently failed to turn off the gas after discovering a leak, a failure by the tenant to prove who ignited the gas, which exploded and caused tenant's injuries, does not overthrow a general verdict in tenant's favor. *McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, distinguished. p. 13.
7. **EVIDENCE.—Photographs.—Preliminary Proof.**—Photographs are admissible in evidence after preliminary proof of correct-

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- ness is made, and it is not material that the witness giving such preliminary proof saw the taking of the photographs. p. 14.
8. *TRIAL.—Instructions.—Covering Only Branch of Case.*—The trial court may, in an instruction, set out the contentions of parties on a single branch of the case without including the contentions in the whole case. p. 14.
9. *SAME.—Instructions.—Invasion of Province of Jury.*—An instruction that “there is some proof tending to show” a certain fact does not invade the province of the jury by leading the jury to believe such fact to be proved. p. 15.
10. *SAME.—Instructions.—Refusal to Give.—Answers to Interrogatories.—Harmless Error.*—The refusal to give a requested instruction is harmless where the answers to the interrogatories to the jury show the facts assumed therein are true. p. 15.
11. *SAME.—Instructions Requested Covered by Those Given.*—The refusal to give an instruction already substantially given in other instructions is not error. p. 16.

From Wabash Circuit Court; *H. B. Shively*, Special Judge.

Action by Albert W. Beaver against the Huntington Light & Fuel Company. From a judgment on a verdict for plaintiff for \$2,500, defendant appeals. *Affirmed.*

Kenner & Lucas, Lesh & Lesh and *S. E. Cook*, for appellant.

Warren G. Sayre and *C. W. Watkins*, for appellee.

ROBINSON, P. J.—Action by appellee for damages for personal injuries resulting from an explosion of natural gas. With their general verdict in appellee’s favor the jury returned answers to interrogatories. Over appellant’s motions for judgment on the answers and for a new trial judgment was rendered on the verdict. The rulings on these motions and on the demurrer to the amended complaint are assigned as errors.

The complaint avers, in substance: That appellant maintained a system of pipes in the streets and up to the property line of abutting owners for furnishing gas to custom-

ers; that property owners using gas were required to allow appellant the sole right to test the piping, including the piping from the curb or street line to the building where the private pipe-line entered through the building, so that appellant might determine for itself the sufficiency of the piping to insure safety in its use; that one Carey had caused a new house built by her to be piped for gas, and that appellant had tested the same and pronounced it secure, and connected the same with its pipe in the street; that the house was about twenty feet from appellant's valve at the street, which valve was under appellant's exclusive control; that from this valve gas was to be conducted to the house through a private pipe or private service valve at the front of the house, which private pipe was laid about eighteen inches deep, until near the house it was carried upward by use of an elbow to a point where it passed between the stone foundation wall and the framework of the house, and then radiated under the house to different parts thereof; that appellee rented the house, and on May 24, 1898, moved therein, and notified appellant to turn on the gas; that appellant's manager came to make the connection to flow gas through the mixer into the cook stove, but found that gas would not flow through the mixer or into the stove, whereupon he announced to appellee that he would turn off the gas at the street valve, and that he would return later and make the attachment; that thereupon the owner of the building procured a plumber to ascertain the location of the defect in the plumbing; that the owner of the building and the plumber, believing that the manager had turned off the gas at the company's supply valve, and that there was no gas still flowing from the line through the company's valve, and believing that the only test required was of the pipes within the building, attempted to make inspection of the pipes within the building, "but what said plumber did plaintiff does not know;" that, had the gas been turned off

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at the street, it could not have reached the cellar, and would not have been there in sufficient quantities to cause the explosion when it did; that by the carelessness, oversight, mistake and negligence of the manager, appellant had turned off the valve at the house, the private property valve, and not the company's valve at the street; that, without the knowledge of appellee, the owner, her agent or the plumber who had done the plumbing, the elbow in the pipe had broken and separated at the point where it was near the wall, and under the ground and invisible to appellee, the owner, agent and plumber, and, by reason of such break, and the mistake, oversight and negligence of appellant's manager in turning off the wrong valve, the gas was "flowing in a heavy volume through the pipes between said company's valve and the house valve, and out through the broken part of said elbow against the wall beneath the ground at a place where there was a seam or crack in said wall through which the gas invisibly flowed and continued to flow at the time said plumber was searching for the leak;" that appellee and the owner and her agent were ignorant of the mistake made by appellant's manager, and were unwarned of danger, believing that no more gas was flowing through the company's valve; that the plumber, without any direction from appellee, by some means unknown to him, ignited the gas under the house, which had permeated through the wall, and to some extent through the house; that without any fault on appellee's part the gas exploded, producing injuries particularly described; that such injuries resulted to appellee without his fault, and by reason of appellant's negligence in failing to turn off the gas at the street, and which the company had on that day turned on at the street valve; that appellant had no right to turn the private valve, but that it was its duty, when searching for a defect in the piping either to or in the house, to turn off the gas at its own valve, and by reason

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of its wrongful act in omitting to turn the gas off at its valve where it had turned it on, and by reason of appellant's failing to warn appellee or the owner or plumber that the company's valve stood open and the gas was flowing into the private pipe, and by reason of appellant's manager's so leaving it to flow, and by reason of his neglecting to ascertain where or how the plumbing should be repaired, the "company and the plumber, by some means unknown and unauthorized by this plaintiff, produced said explosion" and the injuries complained of; that the plumber was not employed by appellee, and was not under his control or direction.

Against the sufficiency of the complaint, appellant's counsel urge in the argument that the acts or omissions complained of do not amount to negligence, and that the pleading shows that an independent intervening agency was the proximate cause of the injury.

The complaint proceeds upon the theory that appellant was negligent in failing to turn off the gas at the street valve and stop the flow of gas into the building.

1. When the manager turned on the gas at the street valve, and found that the pipe was not carrying the gas to the stove in the house, he must have known that the gas was leaving the pipe somewhere between the street valve and the terminus of the pipe in the house. He was acting upon the supposition that there was gas in the street line and in the service pipe up to the street valve. There was no escape of gas until after he had opened the street valve. And knowing, as he was bound to know, the dangerous character of natural gas, and the danger arising from its escaping into or under a building, and not knowing at what point after the gas passed the street valve it was leaving the pipe, it can not be said that he was using due care, under all the circumstances, when he undertook to stop the escape of gas into the house by turning off the gas at any point other than at the point where he had turned it

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on. The complaint shows appellant's negligence, but the question remains whether the facts pleaded show this negligence to have been the proximate cause of the injury.

The plumber engaged to hunt for the leak was not engaged by either appellant or appellee, but by the owner of the property. It is averred that the plumber, while

2. in the building seeking to locate the leak, ignited the gas, which had permeated the house, resulting in the explosion and injuries. The act of the plumber in igniting the gas, if he did ignite it, was an act of negligence, but can this negligent act be said to be itself responsible for the injury? It argues nothing to say that had the company's manager turned off the gas at the street valve there would have been no accident. But, it must be said, that the conduct of appellant's manager created an essential condition to the injuries. And while, in the consideration of negligence as a proximate cause of injuries, the distinction between causes and conditions should be kept in view, yet, if appellant created certain conditions by which some subsequent cause, the occurrence of which might have been expected, was rendered hurtful, appellant is liable. It may be said that the act of the gas being ignited by the plumber could not have been foreseen by appellant, and that it was a cause, the occurrence of which could not have been expected, yet we think appellant's manager was bound to anticipate that if the gas continued to escape into the building it might be ignited in some way and produce injury. "It is, indeed, not necessary," said the court in *Ohio, etc., R. Co. v. Trowbridge* (1890), 126 Ind. 391, "that the precise injury which, in fact, did occur should have been foreseen; it is sufficient if it was to be reasonably expected that injury might occur to some person engaged in exercising a legal right in an ordinarily careful manner." In the case at bar the negligence of

3. appellant consisted not simply of its failure to shut off the gas at the street valve, but in permitting the

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gas to continue to escape into the building. It does not appear from the pleading that the negligent act of the gas being ignited by the plumber broke the line of causation, for the reason that the negligence of appellant in failing to stop the flow of gas, and permitting it to continue to flow into the building, was present and active in the result. The original negligence of appellant was present and active at the time and place of the injury, and contributed to the injury, as did the negligent act of the plumber. The pleading shows there were two causes combining to produce the injury, and, although appellant was responsible for only one of these causes, it can not escape liability because it was not responsible for the other. See *Pennsylvania Co. v. Congdon* (1893), 134 Ind. 226, 39 Am. St. 251; *Knouff v. City of Logansport* (1901), 26 Ind. App. 202, 84 Am. St. 292; *South Bend Mfg. Co. v. Liphart* (1895), 12 Ind. App. 185; *Logansport, etc., Gas Co. v. Coate* (1902), 29 Ind. App. 299; *Terre Haute, etc., R. Co. v. Buck* (1884), 96 Ind. 346, 49 Am. Rep. 168; *White Sewing Machine Co. v. Richter* (1891), 2 Ind. App. 331; 21 Am. and Eng. Ency. Law (2d ed.), 490 *et seq.*; *Lebanon Light, etc., Co. v. Leap* (1894), 139 Ind. 443, 29 L. R. A. 342; *Oil City Gas Co. v. Robinson* (1881), 99 Pa. St. 1; *Louisville Gas Co. v. Gutenkuntz* (1884), 82 Ky. 432.

It is said that it is not alleged in the complaint that appellant knew of any break in the elbow, and, the pipe being a private line, it was not bound to anticipate

4. any leaks. But appellant's manager did know there was a leak in the pipes. He knew after he opened the street valve that gas was escaping into the building, and, as it was his duty to do, he undertook to stop it. It is true the plumbing had previously been tested and found to be secure; but, at the particular time, appellant's manager knew the plumbing was not secure, because after he opened the street valve he had knowledge that gas was

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escaping from some part of the pipe. Had he opened the valve at the consumer's request and gone away, relying on the previous test, and not knowing the gas was escaping, a different question would be presented. But in view of the facts pleaded, the previous test is immaterial, because he knew at the particular time that the piping was defective.

In *McGahan v. Indianapolis Nat. Gas Co.* (1895), 140 Ind. 335, 29 L. R. A. 355, 49 Am. St. 199, cited by counsel for appellant as controlling in this case, appellant was an experienced plumber, employed by the tenant of a building to locate and remedy the defect in the pipes from which gas was escaping. The company had been repeatedly notified, and had promised to shut off the gas, but had not done so. It was not shown that appellant did not know the gas was escaping. He undertook to locate the defect while the gas was flowing into the pipes. While at work, an explosion occurred. It was not shown how or by whom the gas was ignited. It was held that the court could say as a matter of common knowledge that the injury was not due to spontaneous combustion, and that it was impossible without some agency acting upon the leaking gas. It is stated in the opinion that the facts as they were presented by the complaint raised the inquiry as to whether the alleged negligence of the company was the proximate cause of the injury, regardless of whatever agency intervened; and it is held that, indulging the ordinary presumption against the pleading, in the absence of any averment as to the agency necessary to have intervened, the court would presume that it was a responsible agent, that the presumption most favorable to appellee should be indulged, and that was that the intervening agency was the appellant's own act in carrying a lighted lamp which caused the explosion.

The answers of the jury to interrogatories are not in conflict with the general verdict upon the question of appel-

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lant's negligence. They show that the manager
5. turned on the gas at the street valve, and soon afterwards informed appellee that there was something wrong with the pipes under the house. Within a few minutes it was found gas was escaping into the house. The manager then told appellee that the gas would have to be turned off until the pipes under the house were repaired, and he turned the valve at the house. It is found that the manager told appellee to allow no one to touch the house valve, and that when the pipes were repaired he would return and turn on the gas himself, but it is also found that appellee did not know that the gas had not been turned off at the street valve. The findings do not show that appellee had anything to do with igniting the gas.

It is argued that the answers of the jury that there was no evidence as to who ignited the gas, or how it was ignited, excludes every condition authorizing a recovery.

6. But the fact of the explosion is not controverted.

Nor do the findings show that appellee had anything to do with igniting the gas. If appellant's negligence in permitting the gas to continue escaping into the building was present and active at the time the accident happened—and in construing the complaint we have held that it was—and the gas was neither ignited by appellee, nor became ignited through any fault of his, the agency through which it did become ignited is not of controlling importance. It is true that natural gas will not spontaneously explode, but in this instance it did explode; and, if the explosion was impossible without some agency acting upon the leaking gas, then some agency did act upon it, and the jury's answer can mean nothing more than that the evidence did not disclose what this agency was. If it appeared that the gas was ignited by appellee, or became ignited through his fault, there could be no recovery. But upon this question there is nothing in the answers which contradict the finding of the general verdict in appellee's

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favor. The opinion in *McGahan v. Indianapolis Nat. Gas Co.*, *supra*, is based upon the proposition that the injured party's complaint failed to show in any way the agency through which the gas was ignited, and, as it was necessarily ignited through some agency, the court would indulge the presumption most favorable to the defendant as to this agency, that is, that it was ignited through the agency of the injured party himself.

Complaint is made under the motion for a new trial of the court's action in permitting certain photographs of the building to be introduced in evidence. The right

7. to introduce photographs in evidence is always dependent upon the making of preliminary proof of their accuracy. This preliminary proof was made. A witness testified that she saw the building "right away" after the explosion, and that the photographs introduced in evidence were photographs of the building after the explosion. It was not material that the witness did not see the photographs taken, but it was material whether the witness, who saw the building immediately after the explosion, could say that the appearance of the building at that time was correctly represented by the photographs.

Objections are urged to certain instructions given. What we have already said with reference to the complaint and answers to interrogatories is applicable to some of the objections urged, particularly those in reference to the question of an independent intervening agency.

In the eleventh instruction the court did not undertake to state the contentions of the respective parties as to the whole case, but only as to one branch of the case;

8. and, as we understand the issue upon that particular branch of the case as disclosed by the record, the court's statement was right.

The court told the jury in the sixteenth instruction: "There has been some proof tending to show that the super-

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intendent of the company said to the plaintiff he
9. would turn off the gas.” It can not be said that by
this instruction the court told the jury what the
evidence proved. The jury could not have been misled by
the language used, as in the next instruction immediately
following the jury were told that “if you find that fact to
be proved—that the defendant did say it would turn off the
gas—that the plaintiff would have a right to rely,” etc. It
has been held that “if evidence is to be recapitulated, the
jury should not be told what it proves, but only what it
may conduce to prove; leaving, however, its weight with
them.” *Ball v. Cox* (1856), 7 Ind. 453; *Huffman v.*
Cauble (1882), 86 Ind. 591. Even if the instruction was
technically erroneous, when taken in connection with the
other instructions, we do not think any material injury
resulted to appellant.

The second instruction requested by appellant and re-
fused reads: “The complaint avers, amongst other things,
that the defendant, by its agent, announced to or in
10. the hearing of the plaintiff that he would turn off
the gas at the company’s valve in the street, and
that the plaintiff did not know that it was turned off at the
house valve and not at the street. You are instructed that
this is a material averment of the complaint, and unless it
has been proved by a preponderance of the evidence, no
recovery can be had.” In view of the answers to certain
interrogatories submitted to the jury at the request of ap-
pellant, we can not say that the refusal to give this instruc-
tion was harmful to appellant. They answered that ap-
pellee knew the manager had turned on the gas at the street
valve, and, after the escaping gas was discovered, the
manager informed appellee that the gas would have to be
turned off, and that he then went to the house valve and
turned it off. “Did the plaintiff stand by and see and
understand that said gas was turned off at the house valve?
A. He did not. At the time said manager turned off said

gas at the house valve did the plaintiff know and understand that said gas had not been turned off at the supply valve at the curb line? A. No.” There is evidence in the record to support these answers.

Complaint is made of the court’s refusal to give the ninth instruction requested, upon the question of appellee’s contributory negligence. The instruction requested is

11. a proper instruction, but the court had already given the sixth instruction requested by appellant, which reads as follows: “If you find from the evidence that the plaintiff knew that the gas had been turned off at the house valve, and that, at the time the plumber came, and went under the house to search for the leak, he knew the gas had accumulated in the house in a sufficient quantity to cause an explosion, if ignited, and that knowing these facts he remained in the house, you may consider these facts in determining whether or not he was guilty of contributory negligence.” This instruction substantially covers the instruction requested and refused.

We find no error in the record. Judgment affirmed.

EMBREE v. EMERSON, ADMINISTRATOR.

[No. 5,430. Filed April 27, 1905. Rehearing denied June 30, 1905. Transfer denied December 12, 1905.]

1. **PLEADING.—Complaint.—Bills and Notes.—Lost.—Averments.**—A complaint upon a negotiable note, lost before maturity, must allege that such note was not indorsed. p. 20.
2. **SAME.—Complaint.—Bills and Notes.—Lost.—Ownership.**—In an action by the payee of a lost negotiable note it is unnecessary to allege ownership, such fact being presumed. p. 20.
3. **SAME.—Complaint.—Mortgages.—Execution.**—A complaint alleging that defendant “executed” the mortgage sued on is sufficient, since execution includes delivery. p. 21.
4. **APPEAL AND ERROR.—Questioning Complaint for First Time on Appeal.**—A complaint is sufficient, when questioned for the first time on appeal, if the facts stated will bar another action for the same cause. p. 21.

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5. **PLEADING.** — *Complaint.* — *Answer.* — *Demurrer.* — *Carrying Back to Complaint.*—Where plaintiff's demurrer to an answer is overruled, defendant can not complain that it was not carried back and sustained to the complaint. p. 21.
6. **EVIDENCE.** — *Mortgages.* — *Records.*—*Statutes.*—Under §3372 Burns 1901, §2952 R. S. 1881, the record of a mortgage in the recorder's office is admissible in evidence without the production, or proof of loss, of the mortgage itself. p. 22.
7. **SAME.**—*Bills and Notes.*—*Ownership.*—Where the evidence shows that the payee of a note took same as the purchase price of his farm; that he received a mortgage to secure same and recorded it; that it was never assigned; that defendant admitted that the debt was owing and that the payee held such note and mortgage; that payee was a brakeman and was killed in Minnesota and that the note and mortgage could not be found, the court is justified in finding that the payee was the owner thereof at his death. p. 22.
8. **SAME.**—*Presumptions.*—*Bills and Notes.*—*Payable in Bank.*—*Ownership.*—In the absence of evidence, there is no presumption that a promissory note was payable in bank, nor that the payee intentionally parted with title or possession. p. 25.

From Gibson Circuit Court; *O. M. Welborn*, Judge.

Suit by Garrard M. Emerson as administrator of the estate of Alvin H. Embree, deceased, against Albert B. Embree. From a decree for plaintiff, defendant appeals. *Affirmed.*

Lucius C. Embree and *Luther Benson*, for appellant.

Stilwell & Kister and *Levin W. Gudgel*, for appellee.

COMSTOCK, C. J.—Appellee brought this suit against appellant upon a promissory note and a mortgage given to secure the payment of the same, both alleged to have been lost.

The complaint is in one paragraph, and in substance is as follows: On the 4th day of June, 1890, Albert B. Embree executed and delivered to Alvin H. Embree his promissory note for the sum of \$2,000, payable ten years after date, with interest at six per cent from date, dated August 1, 1890. Plaintiff is unable to set out a copy

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of said note, or give a fuller description, for the reason that the same has been lost. The plaintiff has made diligent search and inquiry for the same, but has failed to find it. The note was given for the unpaid balance of the purchase money of the real estate hereinafter described. On said 4th day of June, 1890, to secure the payment of said note, the defendant Albert B. Embree and his wife, Mary E. Embree, then living, but now dead, executed to said Alvin H. Embree their mortgage, a copy of which mortgage is filed with the complaint and marked exhibit A. Said mortgage is lost, and the plaintiff has made diligent search and inquiry for the same, but has failed to find it. The copy above mentioned and set out and marked exhibit A is a copy of the mortgage taken from the record hereinafter named, and is a true copy of the original mortgage. By said mortgage the defendant conveyed and mortgaged to said Alvin H. Embree the following real estate in Gibson county, State of Indiana, to wit: [Then follows a description of the real estate]. On the 15th day of May, 1900, at Hebbing, Minnesota, said Alvin H. Embree died intestate, and on the 7th day of April, 1902, the plaintiff duly qualified and received his letters as such administrator from the Gibson Circuit Court.

A copy of the mortgage which is made a part of the complaint recites that the same is given to secure the payment of an indebtedness of \$2,000, evidenced by a certain promissory note for said sum executed by said Albert B. Embree to Alvin H. Embree, dated August 1, 1890, and due ten years after date, with interest at six per cent from date until paid, interest payable annually, and with attorneys' fees. The mortgage further recites that it is junior to a mortgage made the same day to Ellen Howe for \$1,000 on one of the above-described tracts of real estate by Albert B. Embree and his wife, it being the unpaid balance of the purchase money of the above-described real estate, and that the mortgagors expressly agreed to pay the sum of money

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above secured, without relief from valuation and appraisement laws, together with attorneys' fees.

The appellee answered in three paragraphs: (1) General denial; (2) payment; and (3) that "long before the maturity of the note and mortgage mentioned in the complaint the intestate, Alvin H. Embree, then in full life, but now deceased, accepted and received from defendant a sum of money, to wit, \$1,000, in full payment and settlement of the indebtedness described in the complaint, and agreed to cancel said note and mortgage and forgive said debt, and, in compliance with said agreement, destroyed said note and mortgage." Plaintiff's demurrer to the third paragraph of the answer, on the ground that said paragraph did not state sufficient facts to constitute a defense to plaintiff's cause of action was overruled by the court, and a reply of general denial to the second and third paragraphs of answer filed. Upon the issues joined as aforesaid there was trial by the court, special finding of facts made and conclusions of law stated thereon in favor of the plaintiff, and judgment rendered accordingly.

The appellant has assigned as errors: That the complaint does not state facts sufficient to constitute a cause of action; that the court erred in not carrying the demurrer to the third paragraph of the answer back to the complaint, and in not sustaining it to the complaint; that the court erred in overruling the motion for a new trial.

In the able brief of counsel for appellant the negotiable feature of promissory notes, and the various senses in which the term "negotiable" is used by the statutes in this State and at common law, with an instructive history of the legislation on this subject, are interestingly presented. From such presentation counsel conclude that the effect of the legislation in this State is to render any promissory note, whether payable in bank in this State or not, negotiable in the sense that the indorsee acquires the legal title, and "may

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in his own name recover against the person who made the same." Upon this premise appellant's counsel base the proposition that as it appears that the chose in action has never come into the hands of the personal representative of the decedent, and has not been found among the personal effects of the decedent, the personal representative, in order to recover, must by allegation and proof show that the same was the property of the decedent at the time of his death, and that the record does not make this showing.

It is claimed by appellant that the complaint is defective in not alleging that the note was not indorsed; citing *Elliott v. Woodward* (1862), 18 Ind. 183; *Sloo v.*

1. *Roberts* (1855), 7 Ind. 128; *Kirkwood v. First Nat. Bank* (1894), 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. 683. The cases cited sustain appellant's claim. In *Sloo v. Roberts, supra*, the reason is briefly stated: "If the maker of such lost paper should be compelled to pay, such payment would be no bar to the recovery in the hands of an innocent holder who had received it before due. Hence, a double recovery might be had on the same instrument. The rule, however, would not apply where a negotiable note was lost after due, because in that case the party receiving it after the loss takes the note on the credit of the indorser, and must stand in the situation of the person who was holder at the time it was due." There is, however, no allegation as to when the note was lost. At the death of the payee it lacked some months of maturity. So far as shown it may have been lost before maturity.

It is further claimed that under *Bean v. Keen* (1844), 7 Blackf. 152, the complaint is bad because it is not alleged that the note is the property of the plaintiff. In the

2. case last named the action was brought by the assignee against the maker of promissory notes alleged to be lost. The declaration averred that the notes on which the suit was brought were executed by the maker to the payee, and by a succession of assignments assigned to the plaintiff;

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that they had been lost out of the possession of the plaintiff. There was therefore no question in the case as to the averment of the assignment of the notes, but the court held that it was necessary for the plaintiff to show that he had a legal title to the notes sued on. The presumption is that a promissory note is the property of the payee until some change of title or possession is shown. In an action by the payee it is only necessary to allege the execution of the note to the plaintiff, where the payee is the plaintiff. The complaint in this case alleges that the note was executed and delivered, and that the mortgage was executed to Alvin H. Embree.

The averment of delivery was unnecessary, because

3. the "execution" of such instrument includes its delivery. These objections to the complaint are not tenable.

But this assignment of error must fail upon another ground. The sufficiency of the complaint is questioned for the first time upon appeal. The allegations, the

4. omission of which it is contended make the complaint bad, are of facts which might be supplied by proof, and the complaint is sufficient to bar another action for the same cause, which is all that is necessary to make it sufficient when questioned here for the first time. *Chapell v. Shuee* (1889), 117 Ind. 481; *Robinson v. Powers* (1891), 129 Ind. 480; *Orton v. Tilden* (1887), 110 Ind. 131; *Colchen v. Ninde* (1889), 120 Ind. 88; *Burkhart v. Gladish* (1890), 123 Ind. 337; *Indianapolis, etc., R. Co. v. Petty* (1865), 25 Ind. 413; *Howorth v. Scarce* (1868), 29 Ind. 278.

As to the second specification of error the following cases, and others that might be cited, hold that where the defendant's answer is held good on demurrer he can not

5. successfully urge on appeal that the court erred in not carrying the demurrer back to the complaint. *Gilbert v. Bakes* (1886), 106 Ind. 558; *Haymond v. Saucer* (1882), 84 Ind. 3; *Scheible v. Slagle* (1883), 89

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Ind. 323; *Standley v. Northwestern, etc., Ins. Co.* (1884), 95 Ind. 254; *City of Evansville v. Martin* (1885), 103 Ind. 206; *Pritchett v. McGaughey* (1898), 151 Ind. 638.

There are three reasons set out in the motion for a new trial. The first is that the court erred in permitting the plaintiff to read in evidence the record of the mortgage purporting to have been executed by Albert B. Embree and wife to Alvin H. Embree. The objection made was that it had not been shown that the decedent was the owner of the mortgage or the note secured by the mortgage at the time of his death, or that either of them had been lost, and for the further reason that the mortgage was competent evidence itself. As to this objection the record of the mortgage was properly admitted as evidence. §3372 Burns 1901, §2952

R. S. 1881; *Lyon v. Perry* (1860), 14 Ind. 515;

6. *Morehouse v. Potter* (1860), 15 Ind. 477; *Burns v. Harris* (1879), 66 Ind. 536; *Carver v. Carver* (1884), 97 Ind. 497. As to the other ground of objection, even if there had been no evidence tending to show that the deceased was the owner of the note or mortgage at the time of his death, or that the mortgage had been lost, the mortgage contained in itself the admission of the defendant of the execution of the note to the decedent. For this, if for no other reason, the evidence was properly admitted.

The remaining reasons for a new trial may be considered together. To do this requires an examination of the evidence. There is no controversy over the fact that

7. the land described in appellee's mortgage was conveyed by the decedent to his brother Albert B. Embree. The notary public before whom the two mortgages purported to have been acknowledged testified positively that he drew up the mortgage to Ellen Howe, and that it was his recollection—his memory being refreshed by the record—that he also wrote the note signed by appellant, but that he had no recollection upon the subject of

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what was done with this note. No note except the Howe note, and no mortgage except the Howe mortgage, were left at the office. He supposed that the other papers were taken away, and he had not seen them since. Did not know what became of them. It was his recollection that Albert B. Embree and his wife gave the mortgage to Alvin H. Embree in payment for the land. It is in evidence that the father of the deceased died in 1880. That he was at home in Indiana very little after the death of his father. He came on occasional visits to his mother. After her death, which occurred in 1899, in Princeton, Indiana, he had not been in Indiana for a number of years prior to his death. He died from injuries received in a railroad accident in Minnesota in May, 1900, within an hour after having received his injury. The physician who attended him at the hospital to which he was taken for treatment testified that no package or personal property was brought to the hospital with him; that he saw no note or mortgage said to belong to him, made no search for any; and that his clothing was not removed from his body at the hospital. The undertaker who prepared his body for burial testified that he searched decedent's clothing, and that the only papers found were a traveling card from the union to which the deceased belonged, a receipt for dues and a time-card, and these were sent to Mike Gavin, a friend of deceased in West Superior, Wisconsin. No other property of any description was seen or received by said Gavin. The time-card was sent to his brother at Princeton, Indiana. The deceased at the time of his death was a brakeman on a logging road. Search was made for papers at the headquarters camp at which he lodged. None were found. Appellee made search at banks, at the recorder's office in Princeton, among the papers of his mother, and at such places as it was thought such papers, if in existence, might be found, but was not successful in finding them, or in getting any information in reference thereto. Mr. Gudgel, attorney for the

estate of the deceased, testified that after the appointment of appellee as administrator, appellant, in response to a request from him, called to see him (said attorney) and, in the course of the conversation had between them in reference to the note and mortgage in suit, said that there was more against the land than it was worth; that nothing had been paid on the note in principal or interest; that no sum was to be credited thereon, and that he did not know where the note and mortgage were, and that his brother left nothing but said note and mortgage.

The special findings, in substance, set forth that on June 4, 1890, Alvin H. Embree owned the land described in the mortgage. On that day he conveyed it by warranty deed to Albert B. Embree for \$3,000. In consideration of the conveyance Albert B. Embree made his mortgage to one Ellen Howe for \$1,000 on part of the land, and executed to Alvin H. Embree his promissory note for \$2,000, dated August 1, 1890, payable ten years after date, with six per cent interest, payable annually, and, to secure the note, executed the mortgage in suit. At the time of the execution of the note and mortgage Alvin H. Embree was a single man, a nonresident of Indiana, engaged as a laborer on railroads in the North, seldom returning to his former home in Gibson county, and on May 5, 1900, he was accidentally killed on a railroad in Minnesota, and the plaintiff was appointed administrator of his estate. The plaintiff, after diligent search, has been unable to find either the note or the mortgage, and the same are lost. No part of the debt evidenced by the note and mortgage has been paid, and the decedent held and owned the note and mortgage when he died, no assignment appearing of record. There is due as principal and interest \$3,586.60, and \$189.30 would be reasonable attorneys' fees, as provided in the note and mortgage.

The conclusions of law were, in substance, that the plaintiff was entitled to judgment for the sums found to be

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due, and to a decree of foreclosure and sale. The evidence, we think, fully warranted the findings, and the findings, the conclusions of law.

We find no error. Judgment affirmed.

ON PETITION FOR REHEARING.

COMSTOCK, J.—The note was dated September 1, 1890, in favor of payee, due ten years after date. The decedent died March 5, 1900. This action was commenced

8. in April, 1903. There is no evidence that the note was payable in a bank of the State, and no presumption will be indulged that it was. Nor will it be presumed that the payee intentionally parted with title or possession. The evidence fairly warrants the conclusion that the note is lost and out of circulation.

Petition for rehearing overruled.

RICHMOND NATURAL GAS COMPANY v. DAVENPORT ET AL.

[No. 5,506. Filed December 15, 1905.]

1. PLEADING.—*Complaint.*—*Injunction.*—*Gas-and-Oil Lease.*—*Exhibits.*—Where the owners of the fee bring a suit for injunction against the life tenant and her lessee to prevent their taking and removing oil and gas from the land, the lease so executed is not a proper exhibit to the complaint, and the absence of such does not affect the sufficiency of the complaint. p. 28.
2. ESTATES.—*Real.*—*Gas and Oil.*—*Injunction.*—*Waste.*—Gas and oil, not reduced to possession, are real estate, and belong to the owners of the fee who may protect same by injunction, the taking of same by the life tenant being waste. p. 30.
3. INJUNCTION.—*Cutting Timber.*—*Life Tenant.*—The owners of the fee may, by injunction, prevent the life tenant from cutting and removing timber from their lands. p. 30.
4. ESTATES.—*Life Tenants.*—*Right to Use of Gas and Oil Wells.*—Where the owner of the fee has oil and gas wells in operation and a life estate is afterwards created, the life tenant will be

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entitled to the use of, or royalty from, such wells, but such tenant has no right to begin operations nor to lease to others the right to do so. p. 31.

5. **INJUNCTION.**—*Life Tenants.*—*Remaindermen.*—The fact that the oil and gas will be exhausted before remaindermen will come into possession is no reason to prevent their enjoining the life tenant from boring wells to take out the gas and oil. p. 31.

From Huntington Circuit Court; *Joseph G. Leffler*, Special Judge.

Suit by Parker E. Davenport and others against the Richmond Natural Gas Company. From a decree for plaintiffs, defendant appeals. *Affirmed.*

Robbins & Starr, for appellant.

Eugene H. Bundy, for appellees.

BLACK, P. J.—The court below overruled appellant's demurrer, for want of sufficient facts, to appellees' complaint, and sustained appellees' demurrer to the appellant's answer. In the complaint it was shown that the appellant was a corporation organized under the laws of this State for the purpose of drilling natural gas wells and of selling natural gas for fuel and lights to the people of the city of Richmond, Indiana, and other persons; that for such purpose the appellant owned, operated and maintained a pipe-line to convey and transport natural gas from its gas-wells in Henry county, Indiana, to that city; that it owned and was engaged in drilling gas-wells in Henry county, from which was obtained the natural gas which it conveyed through this pipe-line to its customers and consumers; that the appellees, on September 19, 1900, were, and they still are, the owners in fee simple of certain described land in Henry county; that on that day Cassandra Davenport had and held, and still has and holds, a life tenancy in and to that real estate, and she had not then, and had not at the commencement of this suit, any other, different or greater interest therein than as tenant thereof for and during her lifetime; that on that day there was, and there still

is, in and under that real estate, a reservoir of natural gas, constituting a part of the real estate, and of great value to the same and to the appellees as the owners of the same; that on and prior to that date the natural gas in and under this real estate had never been drilled for or brought to the surface or developed in any manner, nor had any wells been drilled thereon, nor had any experiments or explorations been made thereon for natural gas; that this condition existed at the time Cassandra Davenport acquired the life estate in the land; that on the day above mentioned, she and the appellant, without the consent of the appellees or either of them, and unlawfully and without right, entered into a written agreement or lease, wherein and whereby she, in consideration of the sum of \$1, undertook and assumed to sell to the appellant all the oil and gas in and under the land above mentioned, together with the right to enter upon the land at all times for the purpose of drilling and operating for gas, oil or water, with the right to erect and maintain all necessary telephone lines, buildings and structures for that purpose, together with the right to lay, maintain and remove lines of pipe over and across the land for the conveyance and transportation of oil and gas; that pursuant to this written agreement the appellant entered upon this real estate and erected structures and placed thereon pipe, tools, machinery and appliances for drilling gas-wells, and at the time of the filing of this complaint was engaged in drilling a gas-well and placing therein pipes and appliances for taking and removing the gas lying in and under the real estate, and, if not restrained and enjoined from doing so, it would permanently occupy the real estate and take and remove therefrom the natural gas lying in and under the same, and would commit great waste and lasting and permanent injury to the real estate and to the rights and interests of the appellees therein, which can not be compensated in damages. Prayer for an injunction, etc. The written agreement mentioned in the

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complaint was referred to therein as being attached

1. thereto as an exhibit, but it does not accompany the complaint in the transcript. As the action was not founded upon the agreement, it would not be a proper exhibit, and it would not be considered if so attached, and the question as to the sufficiency of the complaint on demurrer can not be affected by the absence of an exhibit.

In the appellant's answer it was alleged that at the time Cassandra Davenport acquired the life estate in the real estate described in the complaint there was, and at the time of filing this answer there was, underlying this real estate and other real estate adjoining it, in Henry county, a deposit of natural gas which was utilized for fuel and light by the people of that county and of adjoining counties; that this underlying natural gas at all times mentioned was contained in and percolated freely through a stratum of rock known as "Trenton rock," comprising a vast reservoir in which such gas was confined under great pressure, and from which it escaped, when permitted to do so, with great force; that because of the wandering and fugitive character of the gas it had no fixed situs beneath the ground, as deposits of coal and other minerals possess, but flowed about from place to place through the whole reservoir in which it was contained; that, by reason of its nature and character, when gas-wells were drilled in any portion of the real estate under which it was so confined, and thereafter were operated, the gas was drawn to that point from the entire reservoir within which it was so confined; that at the time Cassandra Davenport acquired her life estate in the land, and at the time of the execution of the lease by her to the appellant, the whole gas territory in which that real estate was situated, except that real estate itself, was being mined and worked for natural gas by means of gas-wells; that at the time aforesaid, and continuously thereafter to the time of filing this answer, gas was and still is being drawn in large volumes and quanti-

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ties, by means of said wells so located and operated, from the gas reservoir so underlying the territory and beneath the real estate described in the complaint, and was transported thence by means of iron pipes to various homes and manufacturing establishments throughout that county and the adjoining counties, to be consumed for fuel and light; that by such process the natural gas product would in a short time be all drawn out of the reservoir, and the gas field would be entirely exhausted; that Cassandra Davenport was a woman in good health, of the age of sixty-eight years, and her expectancy of life was nine years, and that long before the expiration of that period, to wit, within two years from the filing of this answer, the entire product of natural gas, by the process of mining therefor then carried on, as aforesaid, on other real estate than that described in the complaint, would be drawn out of the reservoir and from beneath all the real estate in the gas territory, including the real estate described in the complaint, and would be entirely consumed, and the gas field would be completely exhausted, and all the gas beneath that real estate would be lost to Cassandra Davenport, the life tenant, as well as to the remaindermen, the appellees; that under and pursuant to the lease referred to in the complaint the appellant had caused a gas-well to be drilled on the real estate in question, and had the same properly capped and secured to prevent the escape of gas therefrom; that, though it had not operated this well, the pressure of gas and the volume of gas therein had constantly and steadily decreased ever since the well was so drilled, solely because of the operations for gas being conducted on surrounding real estate in the gas territory as aforesaid, and the drawing of gas thereby from the reservoir and from beneath the real estate described in the complaint; that, if the appellant should be permitted to operate the gas-well so drilled, it would do so in such manner as not to injure the real estate or the gas field, but would only take gas from

the well as it would freely flow therefrom at its natural pressure under the natural law of the flowage of gas, and by this means would receive through the well a share of the gas in the reservoir and beneath the real estate in question, which was being drawn therefrom by the operations aforesaid.

It is settled by numerous decisions that the natural gas or the petroleum which may be under the surface, and not reduced to the actual possession of any person, con-

2. stitutes a part of the land, and belongs to the owner thereof in such a sense that he has the exclusive right by operations upon his land to reduce such mineral substance to possession and use and enjoyment and to grant the privilege of doing so to other persons, though until so reduced to possession the mineral substance is subject to be taken by any other person, by proper operations upon his own land, and that a person in possession who has such exclusive right in particular land, as owner of the land or as lessee or grantee with the privilege of extracting such minerals, may by injunction prevent operations for such purpose by others who have not rightfully acquired the privilege from the owner of the land in fee. The taking of these minerals by a stranger by means of wells made without right for such purpose constitutes a trespass, damages for which can not be definitely measured. And the taking by one lawfully in possession of the surface, with right to enjoy the income and profits, but not being the owner of the fee and not having received from such owner the privilege so to take the minerals—that is, by a tenant of the land for years or for life—constitutes waste.

Injunction will lie to prevent one rightfully in possession of land as tenant for life from cutting and removing valuable timber growing thereon at the suit of the owner

3. of the estate in fee simple. *Robertson v. Meadors* (1880), 73 Ind. 43. See, also, *Indianapolis Nat. Gas Co. v. Kibbey* (1893), 135 Ind. 357; *American Steel, etc., Co. v. Tate* (1904), 33 Ind. App. 504.

Richmond Nat. Gas Co. v. Davenport—37 Ind. App. 25.

Where oil or gas has been taken from land by means of wells by the owner of the fee, or he has by his sufficient contract given to another the right so to take it, and

4. thereafter the possession of the land devolves upon a tenant for life, such tenant may enjoy the use of such wells or the royalties therefrom during such tenancy as profits and income from the land in the condition in which it comes to the life tenant. *Andrews v. Andrews* (1903), 31 Ind. App. 189; *Priddy v. Griffith* (1894), 150 Ill. 560, 37 N. E. 999, 41 Am. St. 397.

But where no operations for oil or gas have been carried on by the owner of the fee or his grantee or lessee for such use, and he has not conveyed such right by lease or grant during his ownership of the fee, a tenant of the land for life has no right to operate for oil or gas, or by lease or grant give authority to another to do so. *Marshall v. Mellon* (1897), 179 Pa. St. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. 601. See, also, *Blakley v. Marshall* (1896), 174 Pa. St. 425, 34 Atl. 564; *Williamson v. Jones* (1897), 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. 891; *Westmoreland Coal Co.'s Appeal* (1877), 85 Pa. St. 344; *Appeal of Stoughton* (1878), 88 Pa. St. 198; *Gerkins v. Kentucky Salt Co.* (1897), 100 Ky. 734, 39 S. W. 444, 66 Am. St. 370; *Hook v. Garfield Coal Co.* (1900), 112 Iowa 210, 83 N. W. 963.

The fact that possibly, by the operations upon neighboring lands, all the gas will be taken before the remaindermen come into possession, can not affect the right of the

5. remaindermen to prevent the taking by the lessee or grantee of the life tenant. That such lessee or grantee will not derive any benefit from a grant or lease which the life tenant had no right to make can not be regarded as a hardship to any person. The remedy of the owners in fee is suggested by the peculiar injury threatened to their estate of inheritance. The question whether a state of facts might exist in such a case whereby the remainder-

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men would be estopped to question the right of the lessee or grantee of the tenant for life to proceed to take and utilize the gas need not be discussed, as no such question arises under the averments of the pleadings before us.

Judgment affirmed.

BOARD OF COMMISSIONERS OF THE COUNTY OF
NEWTON ET AL. v. WILD ET AL.

[No. 5,968. Filed December 26, 1905.]

APPEAL AND ERROR.—*Dismissal.—Parties.—Boards of Commissioners.—Taxpayers Resisting Claim against Board.*—Where an action was filed against the board of commissioners and certain taxpayers petitioned the judge to appoint an attorney in addition to the regular attorney to defend for the board, but such taxpayers did not themselves become parties to such action, such board has the right to dismiss an appeal taken by such appointed attorney, although such taxpayers joined in the assignment of errors, there being no judgment against any one but such board.

From Newton Circuit Court; *Charles W. Hanley*, Judge.

Action by John F. Wild and another against the Board of Commissioners of the County of Newton. From a judgment for plaintiffs, defendant appeals, certain taxpayers joining with such board as appellants. *Appeal dismissed.*

Herman C. Rogers and *William Cummings*, for appellants.

Miller & Miller, for appellees.

ROBINSON, J.—Appellees sued appellant board of commissioners as sole defendant to recover the proceeds of certain bonds sold by such board to appellees and which were subsequently declared illegal. On November 2, 1905, a judgment was rendered against appellant board of commissioners alone. Afterwards, Herman C. Rogers filed a motion to correct the record to show the previous filing of a verified petition by certain taxpayers asking the appointment of

Rogers to represent them and their interest. This motion for an entry *nunc pro tunc* was heard by the judge of the Newton Circuit Court, "and it sufficiently appearing to the court that on the 30th day of October, 1905, the court did direct said Herman C. Rogers to appear and defend in said action, and that by inadvertence and oversight of the court said appointment of said Rogers to appear on behalf of the defendants herein and the taxpayers mentioned in said petition was not entered and recorded, and the court now sustains said motion and grants the same, to which ruling of the court the plaintiffs except. It is therefore considered and ordered by the court that the appointment of said Rogers to appear for and on behalf of the defendants herein and of said taxpayers mentioned in said petition be, and the same is hereby, noted, and the same is hereby ordered entered; and it is further ordered by the court that this entry be now made as of the 30th day of October, 1905, *nunc pro tunc*. Charles W. Hanley, judge of the Newton Circuit Court. Done in vacation at Rensselaer, Indiana, November 14, 1905."

Afterwards, November 24, 1905, "comes now H. C. Rogers, as per order *nunc pro tunc*, and refiles his petition of taxpayers of Newton county, which verified petition reads as follows." This petition is signed by Pierce Archibald, A. D. Peck and four others, is verified, and states, in substance: We, citizen taxpayers of Newton county, Indiana, show the court that, in the suit brought by J. F. Wild & Co. against Newton county, they believe and have good reasons to believe that said county commissioners and the special counsel employed by said board of commissioners will not make a good and sufficient defense in said suit, and that unless the taxpayers of Newton county are otherwise represented said suit will be lost to the county and to the taxpayers. Now, we, on our own behalf and on behalf of other taxpayers, most respectfully ask the court to appoint Rogers to represent the taxpayers in this action,

with power to make motions and file pleadings and otherwise conduct such suit as shall be acceptable to the court, in addition to the regular counsel employed by the board.

The only attempted bill of exceptions is as follows: "John F. Wild et al. v. Board of Commissioners of the County of Newton. Come now the defendants, taxpayers, by H. C. Rogers, their attorney, and file their bill of exceptions reading as follows:" [The bill reciting the filing of the petition by taxpayers as above set out, the order of the court thereon, and the entry *nunc pro tunc*.]

The transcript was filed in this court December 7, 1905. On December 13, 1905, William Cummings, the county attorney of Newton county, filed a motion to dismiss the appeal, and with the motion filed a certified transcript of an order of the board made concerning the appeal. This transcript is signed by the county auditor and under the seal of the board. The order of the board, after reciting the recovery of the judgment and the board's belief that the judgment is just and should not be appealed from and that the county should not be put to further expense in contesting the claim, states: "Whereas it appears from the record in which said judgment was rendered that said board of commissioners prayed and was granted an appeal therefrom to the Supreme Court of Indiana; and whereas such prayer for an appeal was unauthorized by this board; now, therefore, this board orders that no appeal be taken from said judgment either to the Supreme or the Appellate Courts of Indiana; and it is further ordered that if a transcript for such appeal be filed in either of said courts, William Cummings, the county attorney of said Newton county, be and is hereby directed to appear in said court in which such transcript may be filed on behalf of this board, and to dismiss such appeal."

The petition by the taxpayers did not ask that they be made parties to the suit, nor was any such request made at any time, nor does it appear that they were at any time

made parties. The petition simply asks that an attorney, Mr. Rogers, be appointed "to represent the taxpayers in this action;" that is, an action in which the board of commissioners still remained sole defendant. The first appearance of the names of the taxpayers as parties is in the assignment of errors in which "Pierce Archibald, A. D. Peck and others, taxpayers of Newton county," are joined with the board of commissioners as appellants.

Section 644 Burns 1901, §632 R. S. 1881, provides: "Appeals may be taken * * * by either party, from all final judgments," except in certain cases. This section can not be construed to authorize an appeal by a party who is not only not a party to the final judgment, but who never was at any time a party to the suit. It is true the taxpayers were interested in the suit, but the record does not disclose that they were made parties to the suit. Their interest as taxpayers is not shown to be different from that of taxpayers in every action brought against a municipal corporation. The county is known in law only by its board of commissioners, and acts, as a county, through its board. If it should be conceded that it might be proper or necessary in a given case for taxpayers to intercede and assume and control the defense of an action against the county, it could not be claimed that such was the case in this action. In this case, appellant was sole defendant in the trial court, was the sole judgment defendant, and has the right absolutely to control the appeal.

Appeal dismissed.

WEAVER, ADMINISTRATOR, v. GRAY.

[No. 5,480. Filed January 2, 1906.]

1. DESCENT AND DISTRIBUTION.—*Husband's Interest in Wife's Real Estate.—Debts of Decedent.—Statutes.*—Where the deceased childless wife received lands as a gift from her father, one-third of such real estate under §2642 Burns 1901, Acts 1891, p. 71, §1, descends in fee to the husband and such one-third is

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not assets of her estate nor liable for her debts; and the other two-thirds, under §2628 Burns 1901, §2473 R. S. 1881, descends, subject to her debts, to the father, if living. *Herbert v. Rupertus*, 31 Ind. App. 553, distinguished. p. 39.

2. PARTITION.—*Executors and Administrators.—Husband and Wife.—Descent and Distribution.*—Where the deceased childless wife received, as a gift from her father, lands, one-third thereof descends to the husband and two-thirds to such father, subject to the payment of her debts; and such husband, father or her executor or administrator may maintain a suit for partition thereof (§1200 Burns 1901, Acts 1897, p. 125). p. 41.
3. EXECUTORS AND ADMINISTRATORS.—*Set-Offs.—Execution.—Exemptions.*—Where the administrator of the estate of a deceased childless wife, by order of court, sells such wife's real estate to pay debts, one-third of which belongs unconditionally to the husband, such administrator can not set off a judgment in his favor against such husband for the funeral expenses of such wife where the husband claims the benefit of a householder's exemption, his entire property being of less value than \$600. p. 42.
4. DESCENT AND DISTRIBUTION.—*Withholding Legacies or Shares in Payment of Debts.*—The executor or administrator of an estate may withhold a sufficient sum belonging to a legatee or to the heir to satisfy any claim from such legatee or heir to the estate. p. 42.

From Decatur Circuit Court; *Francis T. Hord*, Judge.

Final report of Daniel W. Weaver as administrator of the estate of Martha J. Gray, deceased, to which James Gray excepts. From a judgment in favor of the exceptor, the administrator appeals. *Affirmed.*

Ewing & Tremain, for appellant.

John F. Goddard, for appellee.

WILEY, J.—This action arose upon the appellee's amended exceptions to the appellant's final report as administrator of the estate of Martha J. Gray, deceased. During her lifetime the father of the decedent, Andrew Morris, in consideration of love and affection, conveyed to the deceased a tract of land, being in value less than \$1,000. She died without issue, and her father and husband (appellee) survived her. The only personal property that came into the hands of the administrator belonging to the

decedent's estate, was of the value of only \$6.60. She died owing some debts, and the administrator filed a petition to sell the real estate to raise assets with which to pay such debts. To this proceeding the appellee and the decedent's father were parties. The court found that the real estate was not susceptible of division in kind without injury, and ordered the whole tract to be sold, to which appellee consented. In that proceeding the court made a special finding of facts and stated its conclusions of law thereon. Among other things, it found that Andrew Morris, decedent's father, was entitled to receive two-thirds of the assets realized from such sale, subject to the debts of the decedent, and that the appellee, as the surviving husband, was entitled to receive one-third of such assets, and also \$100 in value in payment of improvements which he made upon said real estate, and for which he held a lien. In its conclusions of law the court stated that the appellee was the owner in fee simple of an undivided one-third of all of said real estate, as heir of his wife, subject to the lien of said Gray for \$100 on all of the real estate; that, upon the sale of the real estate, two-thirds of the proceeds thereof should be charged with the payment of two-thirds of the amount found to be due appellee for said improvements, and that after the payment of all of the debts the remaining two-thirds of the assets should be paid to Andrew Morris; that one-third of the amount due appellee for said improvements should be paid out of the other one-third of the proceeds of the sale, and that the residue of said one-third be paid to him as heir of the decedent.

In his final report the administrator charged himself with the sum of \$6.60, derived from the sale of personal property, and the additional sum of \$700, derived from the sale of the decedent's real estate, that being the amount for which the same sold. The total amount with which he charged himself was \$706.60. In his current and final reports he showed disbursements for which he claimed and

was allowed credits aggregating \$380.44, which left in his hands at the time of the filing of his final report the sum of \$326.16. In his final report he showed to the court that the appellee was entitled to receive \$6.60, being the entire amount of the personal estate, one-third of the purchase money of the real estate being \$233.33, and \$66.67 as his lien for the improvements made, making the entire amount due \$306.60. The report further represents that appellee was wholly insolvent and failed to pay the funeral expenses and the expenses of the last illness of his wife; that the administrator paid the same and afterward recovered a judgment against appellee "by way of subrogation for the sum so paid, amounting to—principal and interest—\$158.50; that by reason of the insolvency of appellee this amount could not be reduced to assets; that the administrator retained said amount from the distributive share of appellee to satisfy that debt, leaving a balance due him of \$148.10. To this report appellee filed exceptions. In the first of these exceptions appellee set up the finding of facts and conclusions of law in the proceeding by the administrator to sell real estate and the judgment ordering the sale thereof. It then set out the judgment against appellant for \$147 and costs, and averred that said amount could not be set off against appellee's one-third interest in the sum derived from the sale of decedent's real estate. The same exception set up the householders' exemption statute and asked that appellee be relieved from the payment of such judgment. The trial court sustained appellee's exception as to his right to have paid to him the sum of \$233.33, being the one-third of the amount realized by the sale of the real estate, and that he was entitled to claim the same as exempt by reason of his being a resident householder of the State. The court approved the report of the administrator in all other respects, and directed him to correct the same in the manner indicated.

It is unnecessary to refer to the other specifications of the exceptions, for the question involved in this appeal is fully presented by the first.

That question, plainly stated, is this: Under the facts disclosed by the record was appellant authorized to retain out of the one-third of the fund realized by the sale

1. of the real estate belonging to appellee a sum sufficient with which to pay and satisfy the judgment which he held against appellee? If one-third of the fund thus realized became assets of the estate of the decedent, the question would be of easy solution. In our judgment, however, the one-third of such fund, although it came into the possession of the administrator under the order of the court directing the sale of the real estate, did not become and could not under the statute become a part of the assets of the estate for distribution. Section 2628 Burns 1901, §2473 R. S. 1881, provides: "An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants revert to the donor, if living, at the intestate's death, saving to the widow or widower, however, his or her rights therein: Provided, that the husband or wife of such intestate shall hold a lien upon such property for the value, at the intestate's death, of all improvements by him or her thereon, and for all moneys derived from the separate estate of such husband or wife expended in making such improvements." Section 2642 Burns 1901, Acts 1891, p. 71, §1, provides: "If a wife die testate or intestate leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage."

In this case it is not claimed that decedent's wife had contracted any debts before her marriage. It follows, therefore, that, under the provisions of these statutes, upon her death, appellee was immediately seized of a one-third interest in her real estate, freed from the burden of any

debts, excepting liens, such as mortgages, etc., in which he joined. No such debts or liens are claimed here against the decedent. If this real estate had been susceptible of division in kind, a court would have had no authority to order its sale, for appellee's interest in the real estate was not subject to the payment of the debts of his deceased wife.

In the case of *Kemph v. Belknap* (1896), 15 Ind. App. 77, this court, by Lotz, J., said: "We are of the opinion that it was not the intention of the legislature to make the widower's interest in the real estate which descends to him liable for the general debts of the deceased wife. The widower, like the widow, in the descent of property from the deceased spouse, occupies a different position from that of an ordinary heir." In the same case, it was further said: "The costs of administration and expenses of last illness and funeral expenses were not specific liens upon any part of the realty, and the widower's one-third in no event was subject to the payment of such claims."

One-third of the money realized by the administrator upon the sale of the real estate belonged absolutely and unqualifiedly to the appellee, and became a trust fund in the hands of the administrator. Appellee's right thereto was as certain and definite as was his title to the undivided one-third interest in the real estate upon the death of his wife. To illustrate the relative rights to this fund as between the administrator and appellee, let us suppose that the real estate had been susceptible of division in kind, and had in fact been partitioned, and one-third thereof in value had been set off to appellee. Suppose, again, that subsequently to said partition, the administrator had recovered against appellee a judgment covering the expenses of the last illness and funeral of the deceased wife, and had sought to enforce that judgment by execution by levying upon the real estate so partitioned and set off to him. There is not even the shadow of a doubt but that, under such facts,

appellee could have claimed statutory exemption, if he had brought himself within its requirements, and thus be released from the payment of said judgment. In principle there can be no difference between the rights of the parties, whether one-third of the real estate be set off to him in kind, or whether it all be sold, not being susceptible of division.

Our attention has been called in the briefs to a line of cases, in which it was held that the administrator has the right to apply a sufficient amount of the share of a distributee of the estate in his hands to pay and satisfy a debt which the distributee owes the estate, even though he be a resident householder and have property of the value of less than \$600. *Fiscus v. Fiscus* (1891), 127 Ind. 283; *Holmes v. McPheeters* (1898), 149 Ind. 587. While those cases declare a correct rule of law and an equitable doctrine, they are not applicable here, for the evident reason that the \$233.33, which the administrator shows in his report is due to the appellee as his one-third interest in the fund derived from the sale of the real estate, is not a fund for distribution among or to heirs. It is a trust fund to which the statute gives appellee an absolute right.

Upon the death of appellee's wife he became vested *eo instante* absolutely with a one-third interest in her real estate, and her father in like manner became vested

2. with a two-thirds interest therein, but which interest was subject to the payment of the debts of the decedent. Appellee and decedent's father, therefore, became tenants in common of this real estate, and under §1200 Burns 1901, Acts 1897, p. 125, either one of them and also the administrator could compel partition. The latter did this by petitioning the court to sell the land, and the court, having found that it was not susceptible of division in kind, ordered it all sold. This amounted in law to a partition, and the one-third interest in the amount realized from the sale of the real estate belonged as absolutely to the appellee as his one-third interest in the real estate.

Counsel for appellant assume in their brief that the judgment obtained by the administrator against appellee is one of subrogation; that is, that by such judgment

3. the administrator is subrogated to the rights of the creditors who hold claims for the expenses of the last illness and burial of the decedent. If it be conceded that this proposition is well grounded, it logically and necessarily refutes appellant's proposition that he is entitled to apply a sufficient amount of the \$233.33 in his hands to the payment of the judgment he holds against appellee. By having paid these claims, and subsequently reducing them to judgment against appellee, he could thereby obtain no greater rights than the original creditors, and there can be no doubt but that appellee would have a right, as against them, to claim any property of any character as exempt from execution, as against any attempt to collect such claims in the hands of the original creditors by execution.

In the following cases the right of an administrator to retain, out of the funds in his hands belonging to an heir or a legatee, against whom he holds an unsatisfied

4. claim or judgment, an amount equal to such claim or judgment, is recognized. *Fiscus v. Fiscus, supra*; *Fiscus v. Moore* (1890), 121 Ind. 547, 7 L. R. A. 235; *New v. New* (1891), 127 Ind. 576; *Holmes v. McPheeters, supra*; *Koons v. Mellett* (1890), 121 Ind. 585, 7 L. R. A. 231.

These cases all recognize the right of heirs to participate equally in the estate of their ancestor, and this could not be if one heir, and hence a distributee, should be indebted to the estate in an amount equal to, less or more than his distributive share. In all of the cases cited it is apparent that the rule therein declared rests upon the proposition that heirs of the same class are entitled to share equally in the distribution of the estate, and this is true whether the funds to be distributed are derived from personal property or

real estate converted into money. The cases also involve the proposition that the distribution to heirs, legatees or distributees is to be made out of the general assets of the estate, and that the administrator or other person charged with such distribution can only retain out of such funds a sum sufficient to pay and satisfy a debt, which such heir, legatee or distributee owes the estate. This may be done, as the authorities hold, to the end that an equal distribution may be made and equity done between the heirs. The doctrine upon which the rule rests is tersely stated in the case of *Fiscus v. Moore*, *supra*, and quoted approvingly in *Fiscus v. Fiscus*, *supra*, as follows: "The ground upon which an administrator is entitled to retain so much of the distributive share of a distributee as will satisfy a debt due from the latter to the estate is, that the heir or distributee makes a demand upon the administrator in respect to assets in his hands as administrator, and the just and equitable answer in such a case is that the person making the demand has already in his hands assets belonging to the estate in excess of the distributive share which he is demanding."

The manifest difference between those cases and the one we are here considering is this: There the distribution was to be made out of the general assets or funds of the estate to heirs, legatees or distributees, while here the fund claimed by the appellee never became, and could not, in the very nature of things, become a part of the assets of the estate for distribution. There is no more reason for an attempt to deprive appellee of his right to the undivided one-third interest in the real estate of his deceased wife than there is to deprive him of the fund realized by its sale by the administrator. We might suggest, without attempting to decide, that the law would give to him a specific lien upon that fund in the hands of the administrator. Any reasoning which fails to appreciate the distinction between the right of an heir, legatee or distributee to share in the distribution of an estate out of the general funds of the

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estate, and the right of a surviving husband to the undivided one-third interest in the real estate of his deceased wife under the facts disclosed in this case, must necessarily lead to a conclusion which is neither founded on logic nor reason.

After the most careful consideration of the question involved, we have reached the conclusion that the trial court arrived at the correct result.

This conclusion in nowise conflicts with the rule declared in *Herbert v. Rupertus* (1903), 31 Ind. App. 553. In that case it was held that one-third of the fund derived from the sale of a deceased wife's real estate, which under the statute descended to the surviving husband, was subject to the payment of a mortgage indebtedness upon the real estate, in which he joined and by the mortgage promised to pay. The mortgage was a lien upon the real estate, and the lien followed and attached to the fund in the hands of the administrator. In the case under consideration there was no lien, and this makes the line of distinction between the two easy.

Judgment affirmed.

WILSON v POWELL.

[No. 5,425. Filed October 13, 1905. Rehearing denied December 5, 1905. Transfer denied January 2, 1906.]

1. EVIDENCE.—*Surveys.—Records.—Field Books.—Boundaries.*—The record of a public survey is *prima facie* evidence of the lines run and corners established for three years after such survey (§8030 Burns 1901, §5955 R. S. 1881), and, if unappealed from, is conclusive evidence thereof after such time, and the fact that the records of such survey were kept in the field book and not in the surveyor's record does not destroy the force thereof. p. 46.
2. BOUNDARIES.—*Subsequent Surveys.—Use of.*—A subsequent survey can be had only to ascertain the lines and corners established by the former survey. p. 47.

3. **BOUNDARIES.—Subsequent Surveys.—Title.**—Where a division line was agreed upon in 1879, and in 1892, by agreement, the lands were surveyed and the line and corners established, the plaintiff can not, by giving notice and causing another survey, establish a different boundary line and corners and maintain title up to such new line. p. 47.
4. **SAME.—Surveyors.—Duties.—Title.**—It is the duty of a surveyor to ascertain lines and corners, and a survey can not have the effect of changing title. p. 48.

From Hancock Circuit Court; *Edward W. Felt*, Judge.

Survey by Winfield Powell. From a judgment of the circuit court sustaining such survey, Martha A. Wilson appeals. *Reversed.*

James E. McCullough and *William C. Welborn*, for appellant.

Robert L. Mason, *U. S. Jackson* and *Marsh & Cook*, for appellee.

ROBY, J.—Appeal by Martha A. Wilson to the Hancock Circuit Court from a survey made by the county surveyor of said county. The trial court made a special finding of facts and stated its conclusions of law thereon, to each of which an exception was reserved by the appellant. Judgment was rendered in accordance with the conclusions sustaining the correctness of the survey appealed from and confirming the same. It is conceded that the facts were correctly found. They are to the effect that the parties were in 1876 the owners, as tenants in common, of 100 acres of land in Hancock county, which was then partitioned between them, a proceeding for that purpose having been instituted in the circuit court. Commissioners set off to appellant her portion of said land by the following description: "Commencing at the southeast corner of the southwest quarter of said section, thence north along the middle dividing line 110 rods, thence west 80 rods, thence south along the line parallel with said middle dividing line, 110 rods, to the section line on the south of said section, thence east on said line to the place of beginning." The

north line of the land thus described became the partition line between said lands. In 1879, with the assistance of two of the commissioners to partition, the boundary was determined and a fence built upon it by the parties. In 1892, appellee requested appellant to agree to a survey of their said lands for the purpose of determining the true line between them. The appellant agreed thereto, and the county surveyor surveyed said lands in the presence of both of said parties and located the corners thereof, placing stones at the east and west ends of the division line, as located by him, according to the description heretofore set out. Said corner-stones have since remained unchanged. The corner-stone on the west side of appellant's line was placed 111 rods $25\frac{1}{2}$ links north of the southwest corner thereof, and the one on the east side 110 rods $25\frac{1}{2}$ links north of the southeast corner of said land. Parties at once moved the fence to the line thus surveyed, and no appeal was ever taken from such survey, and such line was recognized as the correct one until shortly before the survey from which this appeal is taken. On February 23, 1903, appellee served a written notice upon appellant, pursuant to which the surveyor of said county made a survey of said lands and fixed the east and west ends of the boundary line in dispute 110.875 rods north of the south line of appellant's land.

The determination of the appeal then depends upon the effect of the survey had in 1892. A record of this survey was made in a small book, designated as a "field

1. book," kept in the surveyor's office, but was not put in the "surveyor's record." It is not contended that such survey was not a valid, official survey, but the conclusions are supported by the contention that, as a matter of law, it is but *prima facie* evidence whether appealed from or not. The statute provides that the owner of land, who desires "to establish, relocate or perpetuate any corner thereof, or in the same section or line thereof," may

have the same surveyed and located. §8024 Burns 1901, §5950 R. S. 1881. It is further provided (§8030 Burns 1901, §5955 R. S. 1881) that "the survey of such surveyor shall be *prima facie* evidence in favor of the corners so established and the lines so run; but an appeal may be taken to the circuit court, within three years, and such court may reverse such survey." It has been uniformly held that an official survey is, in accordance with the terms of said statute, *prima facie* correct during the three years within which an appeal may be taken, and, if not appealed from, it is after that time conclusive upon the owners of the land. *Mull v. Orme* (1879), 67 Ind. 95; *Herbst v. Smith* (1880), 71 Ind. 44; *Grover v. Paddock* (1882), 84 Ind. 244; *Hunter v. Eichel* (1885), 100 Ind. 463; *Waltman v. Rund* (1887), 109 Ind. 366; *Sinn v. King* (1892), 131 Ind. 183.

A subsequent survey can not be had to determine the lines and corners previously established, independently of the former survey, but only for the purpose of ascer-

2. taining the lines and corners as previously fixed.

Herbst v. Smith, supra. These propositions apply to the facts found, and are inconsistent with the conclusions stated. This is regrettable, in that the surveyor, acting in 1892, did not establish the line and corners as should have been done.

If the survey by the county surveyor, made in accordance with the terms of the statute, is ever to be regarded as conclusive, it must be so regarded in this case. The

3. declaration that after three years such a survey becomes conclusive, has been so often made, and conforms so clearly with legislative intent, as to foreclose discussion. That there should be any uncertainty on the subject is due to language used by the courts in a different class of cases, which, disassociated from the facts under consideration, carry a different meaning from that intended.

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The vocation of a surveyor is limited to the ascertainment of definite lines. He may ascertain where the lines and corners specified in the description of the given

4. tract of real estate actually are. He does not have power to determine what the terms of such description ought to be.

Where the line lies and where its corners are are questions which the surveyor, on account of his superior facilities for so doing, may be called upon officially to determine. What the lines and corners are is a matter of law, which courts alone can declare. *Ayres v. Huddleston* (1903), 30 Ind. App. 242. In instances where the party in possession has held beyond the lines specified in his deed until such possession has ripened into title, it has uniformly been held that a survey does not operate to deprive him of the title thus acquired. *Logsdon v. Dingg* (1904), 32 Ind. App. 158; *Webb v. Rhodes* (1902), 28 Ind. App. 393. No question of prescriptive title arises in the case at bar. The facts found also differentiate it from those in which parties estopped themselves by their acts from asserting the true line. *Gullet v. Phillips* (1899), 153 Ind. 227.

The language used in *Spacy v. Evans* (1899), 152 Ind. 431, has manifest relation to cases in which the question of title is at issue.

It follows that the court erred in its conclusions of law. Judgment is reversed. Cause remanded, with instructions to restate conclusions of law in accordance herewith.

**METROPOLITAN LIFE INSURANCE COMPANY v.
WILLIS, ADMINISTRATOR.**

[No. 5,567. Filed January 3, 1906.]

1. **INSURANCE.—Warranties.—Breach.—Delivery to Person in Unsound Health.**—Where assured warranted that he was of sound mind, that he was in good health and that he had never had "disease of the brain," and agreed that the policy should be void unless delivered to him while in good health, the facts that he had been insane, and before the delivery of the policy

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- had been pronounced so by a legal inquisition, and taken to an insane asylum where he died two years later are sufficient for the insurer to avoid such policy. p. 50.
2. **INSURANCE.—Warranties.—Breach.—Receipt of Premiums with Knowledge.**—Where the insurer knew of the assured's breach of warranties and that the policy was delivered to assured when not in sound health, but takes premiums with the knowledge of such facts, such insurer can not avoid such policy. p. 51.
3. **SAME.—Principal and Agent.—Collectors.**—The knowledge of an agent of an insurance company, with authority to "write applications and collect the money" and turn it over to the company, as to insured's breach of warranty is imputable to such company. p. 52.
4. **EVIDENCE.—Witnesses.—Competency.—Waiver.—Insurance.—Executors and Administrators.**—Where assured agreed in his application for insurance to permit his physician to testify, his administrator can not object to the competency of such physician to testify. p. 53.

From Marion Circuit Court (12,871); *Henry Clay Allen*, Judge.

Action by Cassius M. C. Willis as administrator of the estate of Charles A. Taylor, deceased, against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Chambers, Pickens, Moores & Davidson, for appellant.

John W. Bowlus, for appellee.

WILEY, J.—From a judgment against appellant upon a life insurance policy it prosecutes this appeal. Complaint in one paragraph. Answer in three paragraphs, and reply in two.

No question is presented as to the sufficiency of any of the pleadings, except the complaint, and that is waived by a failure to discuss it. Trial by the court, resulting in a general finding and judgment for appellee.

Appellant's motion for a new trial overruled. Under the assignment and the argument in support thereof, it is entitled to have reviewed the ruling of the court on such motion. Four questions are presented by the motion: (1) The finding is not sustained by sufficient evidence;

(2) the finding is contrary to law; (3) the court erred in overruling appellant's motion to find for it; and (4) the court erred in admitting and refusing to admit certain evidence.

The policy of insurance upon which the action is based was issued upon the written application of the insured.

In that application he answered certain questions,

1. and warranted such questions to be true. Such warranty is as follows: "And I further declare, warrant and agree that the representations and answers made above are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance, if one be issued, and that any untrue answers will render the policy null and void, and that said contract shall not be binding upon the company unless upon its date and delivery the insured be alive and in sound health. * * * And I expressly agree and stipulate that in any suit upon the policy herein applied for, any physician who has attended or may hereafter attend me may disclose any information acquired by him in anywise affecting the declarations and warranties herein made."

In his application his answers and representations that are at all material are as follows: "I have never * * * had disease of the brain." "I am now in sound health, * * * nor have I any * * * mental defect or infirmity of any kind." "The following is the name of the physician who last attended me, the date of the attendance, and the name of the complaint for which he attended me: 1900. Dr. Johnson. Grippe." "I have not been under the care of any physician within two years, unless as stated in the previous line, except ——." "I have never met with any serious personal injury, nor never been seriously ill, except as stated below, and for the complaint named, and no other, when I was attended by the following named physicians, and no other: ——."

This application was made and dated June 1, 1901.

The policy was dated June 10, 1901, and delivered the following day. Between the dates of the application and the delivery of the policy an inquest had been held inquiring into the mental condition of the insured, and he was declared to be insane, and was ordered to be incarcerated in the insane asylum. He was so incarcerated, and within about two years died of paresis. The evidence is without contradiction that the insured was insane for some time before he applied for insurance, and was so when the policy was issued; that he remained in that condition until he died, and that the cause of his death was a diseased brain. The evidence also shows that about five years before the policy was issued the insured received a great mental shock, by having a sunstroke. It also shows that in 1899 he had malarial fever, and was attended by Dr. Johnson; also, that for six months or more before June, 1901, he had been attended by and prescribed for by two other physicians.

The policy recites that it is issued upon the written application of the insured, and that no obligation is assumed unless, on the date the policy is delivered, "the insured is alive and in sound health." The evidence shows conclusively that he was not in "sound health" when the policy was delivered. It is unnecessary to cite authorities in support of the proposition that an insurance company has the right to make such conditions a part of its contract of insurance. These undisputed facts establish such a breach of the contract as to relieve appellant of liability. *Neff v. Metropolitan Life Ins. Co.* (1906), 39 Ind. App. —; *Thompson v. Travelers Ins. Co.* (1904), 13 N. Dak. 444, 101 N. W. 900; *Stringham v. Mutual Ins. Co.* (1904), 44 Ore. 447, 75 Pac. 822.

It does not necessarily follow, however, that the contract may not be enforced for other reasons and upon other grounds. Counsel for appellee has not controverted

2. the above statement of facts or legal propositions, but seeks to parry their force by invoking the doc-

trine of waiver. In a second paragraph of reply appellee admits that the insured was declared insane after he applied for insurance, but that appellant demanded and received the payment of premiums of the wife of the assured with full knowledge that he was insane, and continued to demand and receive such premiums up to the time of his death. The uncontradicted evidence supports the facts pleaded in the reply. The wife of the insured paid all the premiums, paying the last one on the day he died, and a short time after his death, but before she or appellant's collector had been informed thereof. The agent who took the application delivered the policy and collected the premiums, was informed by the wife of the insured, soon after the policy was issued, when he went to her to collect the premium, that her husband was insane, and had been sent to the insane asylum. She asked him whether she should pay the premiums under such conditions, and he replied: "Why, yes; the company has paid many a claim that died in the insane hospital. * * * You are not responsible for what happened to your husband after it was written up. Of course, keep it up."

Under these conditions appellant accepted nearly one hundred weekly payments. To avoid the force of these facts, appellant's counsel assert that the agent who made the collections, with knowledge of the facts, could not bind the company, and hence no waiver is shown.

It is exhibited by the evidence that the scope of this particular agent's duties was to "write applications, and collect the money" and turn it over to the company. It

3. being within the scope of his agency to collect premiums, it must be held that his knowledge was the knowledge of his principal, and hence, when he collected premiums, and paid them to appellant, with knowledge of the facts, such knowledge must be imputed to it. The authorities in this jurisdiction all affirm this rule. *Supreme Court, etc., v. Sullivan* (1901), 26 Ind. App. 60; *Supreme*

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Tribe, etc., v. Hall (1900), 24 Ind. App. 316, 79 Am. St. 262; *Northwestern, etc., Assn. v. Bodurtha* (1899), 23 Ind. App. 121, 77 Am. St. 414; *Insurance Co. v. Wolff* (1877), 95 U. S. 326, 24 L. Ed. 387. A contrary rule would be monstrous and open the way to fraud and injustice.

The remaining question for decision is the exclusion of evidence offered by appellant. In the application for insurance the insured expressly agreed and stipulated

4. that in any suit upon the policy any physician who had attended him might disclose any information acquired by him in anywise affecting the declarations and warranties made in the application. A physician was called to visit the insured on June 4, 1901, and appellant examined him as a witness in its behalf. He was asked this question: "What disease, if any, was he afflicted with at that time?" Objection was made that the witness was not competent to testify and answer the question, for the reason that it was a "privileged communication between physician and patient." Appellant offered to prove by the answer that at the time the insured was suffering from "disease of the brain," etc. The statute (§505 Burns 1901, cl. 4, §497 R. S. 1881), which makes inviolate matters communicated by a patient to his physician in the course of his professional business, has always been strictly construed, and the rule is that such confidential relations will be protected by the courts, except where the patient consents to their revelation by the physician.

In *Penn Mut. Life Ins. Co. v. Wiler* (1885), 100 Ind. 92, 50 Am. Rep. 769, it was said: "Notwithstanding the absolutely prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive."

Here the assured, by an agreement in writing, waived this statutory privilege, and we have no doubt but that he had a right to do so. His waiver must operate as such to

those claiming under him. *Adreveno v. Mutual, etc., Life Assn.* (1888), 34 Fed. 870; *Foley v. Royal Arcanum* (1896), 151 N. Y. 196, 45 N. E. 456, 56 Am. St. 621. Our conclusion is that the court erred in excluding the evidence. But we can not regard this as reversible error, for the exclusion of the evidence in nowise prejudiced the rights of appellant. For the reasons stated, appellee was entitled to judgment, and the result could not have been different if the excluded evidence had been admitted.

Judgment affirmed.

SEELYVILLE COAL & MINING COMPANY v.
MCGLOSSON.

[No. 5,515. Filed January 3, 1906.]

COURTS.—*Jurisdiction.—Appeal and Error.—Constitutional Law.—Statutes.—Payment of Wages.*—Where, on appeal to the Appellate Court, the constitutional validity of §§7065, 7068 Burns 1901, Acts 1887, p. 13, §§1, 4, providing for the payment of wages to employes biweekly, is involved, jurisdiction is in the Supreme Court and such cause will be transferred thereto.

From Vermillion Circuit Court; *A. F. White*, Judge.

Action by Jacob W. McGlosson against the Seelyville Coal & Mining Company. From a judgment for plaintiff, defendant appeals. (For decision of Supreme Court, see 166 Ind. —.) *Transferred to Supreme Court.*

T. W. Harper, C. W. Ward and Frank A. Kelley, for appellant.

William Tichenor and G. G. Rheuby, for appellee.

ROBINSON, J.—Appellee sued for wages for work and labor in a coal mine.

The facts found by the court are, in substance: Appellant was an Indiana corporation during the years 1901 and 1902. Appellee was employed by appellant as a laborer

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for the purpose of mining coal. On December 10, 1901, appellant was indebted to appellee \$24.41 for wages in mining coal. Appellant had adopted the 10th and 25th days of each month as regular days for paying wages due its employes. The sum of \$24.41 was for wages due appellee for two weeks' labor prior to December 10, 1901. On the 11th day of that month appellee demanded such sum, which demand was refused, and the same is now due and unpaid. On December 25, 1901, appellant was indebted to appellee \$16.66 for wages. Because December 25 was a holiday, appellant selected December 24 as a pay-day. The sum of \$16.66 was for wages for two weeks' labor prior to December 25. On December 24, appellee demanded payment of such sum, which was refused, and such sum is due and unpaid. On January 10, 1902, appellant was indebted to appellee \$17.92 for wages due for two weeks prior to that date. On the 13th day of that month appellee demanded such sum, which demand was refused, and the same is due and unpaid. The labor performed by appellee for appellant was performed, and the wages due therefor became due, in Vigo county, Indiana. On February 21, 1902, appellee commenced this action for the recovery of such sums and penalties. He employed an attorney who has rendered services of the value of \$50.

As a conclusion of law the court stated that appellee is entitled to recover the sum of \$58.99 for his labor, and the further sum of \$117.98 as the penalty thereon, and the sum of \$50 as his attorney's fees—in all the sum of \$226.97.

If this action is brought under §§7056, 7057 Burns 1901, Acts 1885, p. 36, §§1, 2, the judgment, as argued by appellant's counsel, should be reversed upon the authority of *Chicago, etc., R. Co. v. Glover* (1902), 159 Ind. 166, and *Toledo, etc., R. Co. v. Long* (1903), 160 Ind. 564. But the above act makes provision for the payment of wages monthly, and the special findings show that the proceedings evidently were had under the statute providing for the pay-

ment of wages biweekly. §7065 *et seq.* Burns 1901, Acts 1887, p. 13.

Section 7065, *supra* (section one of said act), provides: "That every corporation, association, company, firm or person engaged, in this State, in mining coal, ore or other mineral, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading, barrels, brick, tile machinery, agricultural or mechanical implements, or any article of merchandise, shall pay each employe of such corporation, company, association, firm or person, if demanded, at least once every two weeks, the amount due such employe for labor, and such payment shall be in lawful money of the United States, and any contract to the contrary shall be void." Section 7068 Burns 1901, Acts 1887, p. 13, §4, provides: "Every corporation, company, association, firm or person who shall fail for ten days after demand of payment has been made to pay employes for their labor, in conformity with the provisions of this act, shall be liable to such employe for the full value of his labor, to which shall be added a penalty of \$1 for each succeeding day, not exceeding double the amount of wages due, and a reasonable attorney's fee, to be recovered in a civil action and collectible without relief."

It is not claimed by counsel that the case is not made out under the above sections, but it is argued that the act is unconstitutional. For the determination of that question the case must be transferred to the Supreme Court, and it is so ordered.

TOWN OF SYRACUSE v. WEYRICK.

[No. 5,513. Filed January 3, 1906.]

1. EMINENT DOMAIN.—*Streets.*—*Municipal Corporations.*—Towns have the right to exercise the power of eminent domain for the widening of streets but until the statutes prescribing the method of condemnation have been fully complied with, such towns have no right to take lands for such purposes. p. 58.

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2. **INJUNCTION.**—*Municipal Corporations.—Streets.*—Injunction lies to prevent a municipal corporation from taking plaintiff's lands for the purpose of widening its street when no proceedings have been taken to acquire such lands. p. 58.
3. **SAME.**—*Appropriation of Lands.—Adequate Remedy at Law.—Trespass.*—The law affords no adequate remedy by an action for damages in a case where a town is threatening to appropriate plaintiff's lands for street purposes, injunction being the only effectual remedy. p. 58.

From Kosciusko Circuit Court; *Edgar Haymond*, Special Judge.

Suit by Emma Weyrick against the Town of Syracuse. From a decree for plaintiff, defendant appeals. *Affirmed.*

A. L. Cornelius and *J. M. Van Fleet*, for appellant.

Frazer, Biggs & Frazer, for appellee.

MYERS, J.—This is an action by appellee to enjoin appellant from taking a portion of her land, without right, for the purpose of widening one of its streets.

The complaint is in two paragraphs. A demurrer for want of facts was overruled to each paragraph, and appellant answered by a general denial. Trial and judgment in favor of appellee perpetually enjoining appellant from taking her land for the purpose of a highway or a street, "unless and until defendant shall proceed for such purpose according to law by proper proceedings for condemnation of plaintiff's said premises, and the appointment of commissioners to assess benefits and damages." From this judgment defendant below prosecutes this appeal, and assigns as error the overruling of the demurrer to each paragraph of the complaint. Appellant contends that each paragraph of the complaint is insufficient, because (1) there is no averment that appellant is insolvent or unable to pay the damages which appellee might sustain; (2) there is no allegation specifying the amount of land that appellant is threatening to take, or its value; and (3) appellant has an adequate remedy at law. It appears from each

paragraph of the complaint that appellee is a resident of the town of Syracuse, and the owner and in possession of certain real estate having a frontage of 300 feet on one of the streets of said town; that for the purpose of widening such street appellant is threatening to, and will unless enjoined, enter upon her said lands so fronting on said street, and throw open to the use of the public as a permanent highway a strip several feet wide, the exact width unknown to her, without her consent, and without acquiring any right under the statute authorizing it to take her property for such use.

The General Assembly of this State has vested incorporated towns with the power to open new streets, and to widen and straighten existing streets, and to take

1. and use private property for that purpose. But the taking of such property is unauthorized until the statutory provisions precedent to the taking of the same have been complied with, or the consent of the owner otherwise obtained.

Appellant, not having secured the right permanently to locate a public highway on appellee's land in any of the modes authorized by law, may, in an action for

2. that purpose, be prevented by injunction from so doing. *City of New Albany v. White* (1885), 100 Ind. 206, and cases cited; *Town of Hardinsburg v. Cravens* (1897), 148 Ind. 1.

In the case at bar the threatened trespass is of a permanent character, and its effect is to exclude appellee from the enjoyment of a portion of her property, and is

3. widely different from a trespass of a temporary or a fleeting nature. For the latter, ordinarily the law provides an adequate remedy, and for this reason usually an injunction will not be granted. But in the former, as was well said by the court in *Poirier v. Fetter* (1878), 20 Kan. 47: "Here the act sought to be enjoined is not a mere naked trespass. It disturbs the plaintiff's

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possession, and will, if permitted to continue, ripen into an easement. User will establish a highway, and the officer is attempting to create the user. The law will protect a landowner in his possession against any unauthorized interference therewith. See, as cases in point, among a multitude, *McArthur v. Kelly* [1831], 5 Ohio 139; *Moorhead v. Little Miami R. Co.* [1848], 17 Ohio 340; *Anderson v. Commissioners, etc.* [1861], 12 Ohio St. 635; *Bohlman v. Green Bay, etc., R. Co.* [1872], 30 Wis. 105; *Diedrichs v. Northwestern Union R. Co.* [1873], 33 Wis. 219; *Weigel v. Walsh* [1870], 45 Mo. 560; *Carpenter v. Grisham* [1875], 59 Mo. 247. The threatened loss of his land, is the irreparable injury, and it matters not how solvent he may be who seeks to take it or to transfer it to the public use, the courts will protect the possession of the owner." See, also, *Ryan v. Brown* (1869), 18 Mich. 196, 211, 100 Am. Dec. 154; *Church v. Joint School District, etc.* (1882), 55 Wis. 399, 13 N. W. 272; *Uren v. Walsh* (1883), 57 Wis. 98, 14 N. W. 902; 1 High, *Injunctions* (3d ed.), §578.

Each paragraph of the complaint is sufficient.

Judgment affirmed.

 McCLASKEY v. McDANIEL ET AL.

[No. 5,376. Filed June 22, 1905. Rehearing denied November 1, 1905. Transfer denied January 3, 1906.]

1. JUDGMENT.—*Res Judicata*.—*Highways*.—*Petition to Establish by User*.—The denial by the board of commissioners of defendants' right to have a certain way established as a highway by user is not *res judicata* as to defendants' right to use such way nor as to plaintiff's right to close such way. p. 70.
2. HIGHWAYS.—*Twenty Years' User*.—*Consent*.—*Statutes*.—In an action involving the question whether a certain way is a public highway, the fact of its public use for twenty years is, as to such action, conclusive of its being a public highway, whether used with or without the consent of adjoining landowners. p. 70.

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3. **HIGHWAYS.**—*Use.*—*Equitable Estoppel.*—Where adjacent owners laid out a lane on the line between them, connecting with the public highway, and kept it open and improved, erected fences on the sides, allowed its use by the public, knew that neighbors were erecting valuable buildings in such manner as to rely upon an outlet thereby, and intending purchasers, after being told by such neighbors that it was public and after observance of all the conditions, in good faith purchased lands relying upon such appearances and representations, such adjacent owners are equitably estopped from preventing the use of such way by such purchasers. p. 70.
4. **SAME.**—*Dedication.*—*Intention.*—*Inferences from Conduct.*—The intent necessary to dedicate lands to public use for highway purposes may be inferred from conduct. p. 71.
5. **SAME.**—*Dedication.*—*Acceptance.*—*Work by Public.*—Acceptance of a highway dedicated to the public may be shown by public use, without any public work on such way, and no specific length of time is necessary to a valid dedication, assent by the landowner, and public use so long that a denial of the right to such use would discommode the public, being all that is necessary to be shown. p. 71.

From Montgomery Circuit Court; *Jere West*, Judge.

Suit by Ebenezer P. McClaskey against Joseph R. McDaniel and another. From a decree for defendants, plaintiff appeals. *Affirmed.*

E. C. Snyder and *Crane & McCabe*, for appellant.

Clodfelter & Fine, for appellees.

BLACK, J.—The appellant sued the appellees, Joseph R. McDaniel and Ida M. McDaniel, to quiet appellant's title to certain real estate. The facts were stated by the court in a lengthy special finding. In 1831 James McClaskey, appellant's father, became the owner and occupant of the west half of the northeast quarter of a certain section of land, numbered twenty, being the land described in the complaint; and about the same time Harrison McDaniel became the owner and occupant of the east half of the same quarter section, and William Cox became the owner and occupant of the southeast quarter of the same section, and Benjamin Peebles became the owner and occupant of the

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northeast quarter of section twenty-nine, lying immediately south of the land of William Cox. McClaskey erected his residence near the east line of his land; McDaniel erected his residence in section twenty-one, immediately east of his land above mentioned; Cox erected his residence sixty rods south of the north line and twenty rods west of the east line of the west half of the southeast quarter of said section twenty; and Peebles erected his residence about eighty rods south of the north line and twenty rods west of the east line of the west half of the northeast quarter of said section twenty-nine. About that time there was established and laid out a public highway east and west through the middle of said section twenty-nine, known as the "Overcoat road," extending east through the middle of sections twenty-eight and twenty-seven, and extending west and connecting with other public highways so as to make a direct route to the town of Crawfordsville. About the same time there was established and laid out a public highway known as the "State road," extending from the public highway above mentioned, at the center of said section twenty-eight, whence it ran northwestward through that section and section twenty-one and the east half of the northeast quarter of section twenty (the land of McDaniel, above mentioned), and continuing to a highway which ran to the town of Darlington. The "Overcoat road" has continued to exist, and is now a graveled pike; and the "State road" has continued to run as above stated, except that about fifteen years before the trial of this cause it was deflected so as to run along the north line of section twenty, and from a point on the line dividing the lands of McClaskey and McDaniel it runs north to Darlington, and is now a graveled pike. About the year 1850 these people commenced to fence their lands, and thereby to cut off the byways and wagon ways by which they had been accustomed to cross each other's land to reach the public highways. Before that time McClaskey had a

fence on the east and south lines of his land from a point east of his residence to the south line of his land, and thence westward between his land and the land of Cox. In 1850 it was agreed by McClaskey and McDaniel that in fencing their respective tracts there should be a lane left for the convenience of McClaskey in the handling of his stock, and in going to and from his residence, and in the farming of his land, in pursuance whereof McDaniel, in fencing off the southern portion of his land, placed his fence about ten or twelve feet east of the line dividing his land from that of McClaskey, and soon thereafter McClaskey moved his fence above mentioned eight or ten feet west of said line, and McClaskey cut out the timber and cleared up the way sixty rods in length. For five years thereafter McClaskey in going to Crawfordsville would pass south through this way to the land of Cox, across which he would pass diagonally upon a wagon road which McClaskey and Cox had for some years used to reach the "Overcoat road." About this time Cox commenced to fence his land, and extended a fence north from his residence on a line with the fence on the west side of the lane above mentioned (designated herein as the "McClaskey lane"), joining his fence with that of McClaskey, and Cox cleared a roadway from his home up to said lane, and used the lane thereafter whenever he desired in passing to the public highway. At this time, and for some years before, there was a wagon road south from the residence of Cox across his land and the land of Peebles to the "Overcoat road." This wagon way was open through the land of Cox, but on the land of Peebles there were a number of gates across the way. From time to time McClaskey and McDaniel, in fencing the remainder of their lands, extended said lane northward, until at the end of about fifteen years the lane extended to the north lines of their lands, where it opened upon an east and west public highway, and McClaskey, from time to time, cleared and re-

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moved the timber from the lane, so that about the year 1865 there was a continuous lane, open and unobstructed, about twenty feet wide along the line dividing the lands of McClaskey and McDaniel; and in the meantime Cox had constructed a lane, of the width of the McClaskey lane, from a point east of the residence of Cox, northward on the lines dividing the east and west halves of the southeast quarter of section twenty, to the McClaskey lane, so that there was a continuous lane to the public highway running to Darlington and a way with gates thereon southward to the "Overcoat road;" and Cox and his grantees have used the lane for egress and ingress, to the present time, except during a period in the years 1884 and 1885, when it was obstructed temporarily by timber thrown down by a tornado, which timber was cleared away by James McClaskey. About twenty years before the trial Cox erected a residence for his son about thirty rods south of the old Cox residence and fifteen rods east of the line dividing the east and west halves of the southeast quarter of section twenty. Soon afterward the Cox land was subdivided and sold to different persons, and about fifteen years before the trial a house was built at the northwest corner of the east half of the southeast quarter of section twenty, by the person then owning the land on which it was built (now owned by the appellee Ida M. McDaniel). The houses so built by Cox have been occupied continuously, except that the one built for his son was destroyed by fire about two years before the trial. All these houses and their outbuildings were built and arranged so as to face the lane and way in front thereof, and so as to use it as a means of ingress and egress in going to and from Crawfordsville and Darlington. About nine or ten years before the trial the persons owning the lands south from the north line of the southeast quarter of section twenty, on the line dividing the east and west halves of that quarter section and the east and west halves of the northeast

quarter of section twenty-nine, agreed to make an open road from said north line to the south line of the northeast quarter of section twenty-nine, where said road would open upon the "Overcoat road;" and they accordingly did open such road thirty feet wide, and built substantial fences on each side thereof, and made a good roadway, and expended a great deal of time and money in improving it, and they have improved and arranged all their farms and buildings and lots with reference to it. The appellant knew of this improvement, and that it was going on, and that the persons who before that time had used said way from the "Overcoat road" north had also used and traveled over said lane on his premises, and that they used the lane as a means of passing from said way to the public highway and as part of a passageway from the "Overcoat road" to the Darlington road. Except in the years 1884 and 1885, when the way was so temporarily obstructed, said way and lane from the "Overcoat road" to the "Darlington road" has been so used continuously by all persons residing along the same, and by all persons who desired to visit said premises or persons living thereon, and to some extent by the traveling public in passing between the "Overcoat road" and the "Darlington road." At first, said lane and way was seldom used except by those who resided upon premises adjacent thereto, and by those desiring to visit them, but as the region became more populous the road was more frequently used by others than those living along it; and within the last eight or ten years before the trial, and especially since said open roadway was made from the north line of the Southeast quarter of section twenty to the "Overcoat road," the way has been quite frequently used by the traveling public. For thirty years before the trial there has been a well-worn and beaten wagon track, plainly distinguishable, from the north end of the McClaskey lane to the "Overcoat road," and said track was worn and made by persons traveling over the land and

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way as aforesaid. James McClaskey and his grantees have always kept the lane open solely for their own accommodation in the use of their land and in passing to and from the house thereon. Cox opened his lane and joined his fences as aforesaid with the knowledge and consent of McClaskey and Harrison McDaniel; and Cox immediately commenced to use the lane with the knowledge of McClaskey and McDaniel, but without asking or receiving their consent, but no objection was made to such use. It was stated in the finding that there never had been a claim of right on the part of any one to use the lane, but the use has been without objection on the part of any one, and without the asking or obtaining of the right or consent of any one; but James McClaskey and the appellant have permitted the use of the lane by any person who saw fit to use it, without objection, and it has been used by any person who saw fit to use it, because there was no objection, and because it was open and unobstructed, and was a convenient way to pass back and forth between the "Overcoat road" and the "Darlington road," and other highways, except that it has been used by persons living along the way as a means of ingress and egress, and has always been used by persons desiring to visit the premises along the way. James P. McClaskey and the appellant, it was found, never intended to dedicate the land to public use or to give any one the right to use it, but simply intended to permit its use by whoever saw fit to do so, so long as it did not interfere with the owner's rights, and the McClaskeys, until the controversy out of which this case arose, did not know that any person claimed to have a right to pass over the lane, if objection were made, except such notice as would result from certain proceedings before the board of commissioners of the county hereinafter mentioned. The McClaskey lane had never been worked by the public, and all the work thereon was done by the McClaskeys or by persons who first asked and obtained their

consent, and the work done on the lane would not average more than \$5 in five years, a considerable part of it being done by the McClaskeys. About the year 1893 Joseph R. McDaniel, appellee, being desirous of purchasing real estate, went from Darlington through the McClaskey lane in a buggy to the residence of William Cox, the way thus far being unobstructed, but between said residence and the "Overcoat road" it was obstructed by gates, at different points. He observed the traveled and worn track and the improvements and fences, and observed how the houses faced along the road and were arranged with reference thereto, and he inquired and was informed by the persons then owning the southeast quarter of section twenty that the lane and roadway could not be closed or obstructed except as he then found it, and that the persons living along the way had the right to use it, and that the lane and way had been so used for some twenty-five or thirty years. McClaskey did not know of these representations to McDaniel, who did not inquire of McClaskey concerning the lane, and McClaskey never made any representations concerning it, and did not know that McDaniel was thinking of purchasing real estate there. McDaniel, from what he saw and what he was told, believed in good faith that the lane and roadway could not be closed, obstructed or changed, and that persons residing along the same had a right to travel over the lane; and he relied upon the appearances and what was told him in good faith, and acted upon the same. He was representing his wife, Ida M. McDaniel, appellee, as her agent, and he informed her of the conditions as he understood them, as to the lane and roadway, and what he was told and saw, and she did not know anything concerning the matter but what he told her. A few days afterward the appellees, in going to look at the land, went from the south, from the "Overcoat road" to the home

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of Cox, and thence to the house at the northwest corner of the east half of the southeast quarter of section twenty, both of them observing the conditions of the lane and the worn track and improvements; and they both believed that the lane and way could not be closed up or obstructed; and, relying on said representations and appearances, appellee Ida McDaniel purchased of the owner thereof the northeast quarter of the southeast quarter of said section twenty, paying therefor \$1,500, believing in good faith that the lane could not be closed or obstructed, and that she had a right to use it. If the lane can be closed, the real estate so purchased by her will be worth from \$10 to \$15 less per acre than if it remain open. When she purchased there were a house and a barn on the land, near the south end of the McClaskey lane, said buildings facing the lane and way, with gates opening thereon, indicating that persons going to and from the premises would pass from and to the lane and way, and use the same for ingress and egress. This land also extended eastward to the "State road," where there was a gate, to which a wagon road extended from the buildings on the land, of which fact she had knowledge. She immediately took possession of the premises, with her family, and has continued to live there since that time, and in going to and from the premises she and her family have used the way and lane, and also the wagon road crossing the land to the eastern highway. In 1898 the appellees purchased of the owner thereof the north half of the northwest quarter of the southeast quarter of said section twenty, on the west side of said way, and immediately across the same from their residence, paying therefor \$650, and have since held possession thereof.

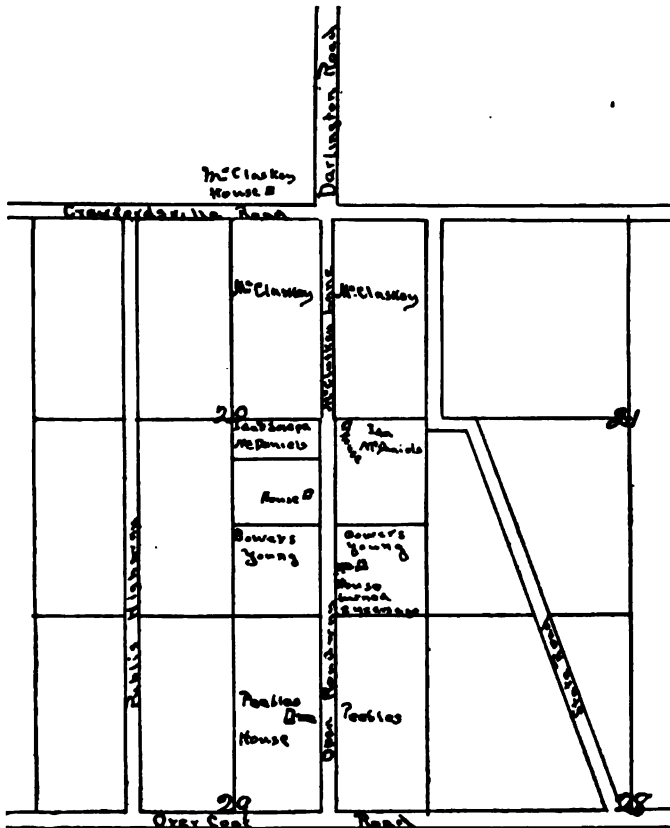
Since the purchase of said land in 1893 the appellees have put thereon valuable and lasting improvements, described in the findings. In 1899 the appellees filed a petition before the board of commissioners of the county, and

caused notice thereof to be served on the appellant, to have the McClaskey lane declared a public highway, on the ground that it had been used as such for more than twenty years, continuously, and asked to have it recorded as a public highway, and the board of commissioners heard the matter and entered an order refusing to grant the petition, from which there has been no appeal. The McClaskey land since 1878 has been owned and occupied by the appellant, in part as heir, and in part as purchaser from other heirs, having knowledge at the time he became such owner of all the facts herein stated that had occurred before that time.

A few days before the commencement of this action the appellant made arrangements for constructing a wire fence instead of the rail fence on his side of the McClaskey lane, and called upon the appellees to assist him in locating the point of division of their lands at the south end of the lane, which was done by the parties hereto, and thereupon the appellant set a post at the south end in such position that a wire stretched therefrom northward to connect with a portion of the fence which had previously been wired would so run as to narrow the lane a few inches in some places where the fence as theretofore constructed was not in a straight line; but the prospective wire fence would not come near the traveled track or interfere with the free use of the lane as it had theretofore been used. When the appellant commenced to make this wire fence, the appellees objected thereto, and claimed that the appellant was encroaching on the lane, without right, and that the appellees had a right of way over the lane. The appellant then claimed that he had a right to build the wire fence where he might wish to do so, and to close up the lane, and denied the right so claimed by the appellees.

The following plat represents the surroundings as they have existed for the last nine years:

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In the conclusions of law stated by the court it was held that the appellant is entitled to have his title quieted to the real estate described in his complaint, except that the appellees have a right to use, pass over and travel upon said road known as the McClaskey lane, one-half thereof being upon the land of the appellant, and that the appellant, in erecting the fence upon the west side of the road, was not interfering with the rights of the appellees, who were not entitled to an injunction sought by them in a cross-complaint.

The question presented is one between the owner of land on which such a way is in part located, and persons owning

and occupying other land situated with relation to the way as is that of the appellees, and acquired under such circumstances as are stated in the finding. The case is not one in which it is sought to have a way recorded as a public highway, not less than thirty feet in width, under the statute. §6762 Burns 1901, Acts 1897, p. 192. It is one in which the court refused to quiet the title of the adjudged owner of the land as against the right of the defendants to the use of the way, but adjudged his right to fence in his land from the way substantially as it had been fenced in for many years.

The denial by the board of county commissioners of the application of the appellees did not, as between the appellant and the appellees, amount to an adjudication

1. upon the subject-matter here involved, and conclusively establish the right of the appellant to close up the way so far as it lay upon his land, or conclusively settle the question as to the right of the appellees to continue to use the way as it existed.

Where, in litigation involving the question as to whether a way is a highway, it appears that the way has been used as a public highway for twenty years or more, it

2. must be deemed, for the purposes of such litigation, to be a public highway; "and it is immaterial whether the use is with the consent, or over the objections, of the adjoining landowners. * * * With the expiration of the twenty-years' use * * * the statute intervenes and declares the road to be a public highway regardless of its origin or the mere objections by landowners." *Strong v. Makeever* (1885), 102 Ind. 578, 584, and cases there cited.

It clearly appears that the McClaskey lane has been used as a highway. If it can be said that the court, in its special findings, does not state, as an ultimate fact, how

3. long it has been so used with sufficient definiteness to enable the court to determine as a matter of law the existence of a highway by user, as to which we need

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not decide, we think that it is sufficiently shown, as between the parties to this action, that the lane is a highway by implied dedication, which arises by operation of law from the conduct of the landowner, and is founded upon the doctrine of equitable estoppel. It is essential to such dedication that the donor shall intend to appropriate the land to the public use, but the intent thus contemplated

4. by the law is not a mere secret purpose. It may be an intent presumed from the visible conduct of the landowner. Individuals as well as the public have the right to act with reliance upon open conduct on the part of the landowner such as would induce an ordinarily prudent man to infer such intent, notwithstanding any hidden or unexpressed purpose in his mind to the contrary. Therefore it is not always necessary to a dedication that the intent to dedicate should actually exist in the mind of the landowner, who in this matter, as in others generally, must be presumed to have intended what his conduct indicates under the circumstances of the case. To constitute irrevocable dedication there must also be acceptance of the donation, but there may be implied acceptance, and where the use of the way as a highway is beneficial to the public, and it has been used for a highway for a considerable period, with the assent of the landowner, and other land has been purchased and improvements made thereon by persons believing the way to be a highway, under circumstances, known to the owner of the way, reasonably calculated to create such belief, and material injury would ensue to such persons if the landowner were permitted to close the way on his premises, the intent to dedicate and the acceptance of the donation will be implied, as between such persons, if the facts be such as under the established principle of law would ordinarily create an estoppel *in pais*.

Acceptance may be shown by public use, without

5. any public work on the road. *Green v. Elliott* (1882), 86 Ind. 53; *Elliott, Roads and Sts.* (2d

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ed.), §160. "No specific length of time is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment." 2 Dillon, Mun. Corp., §631, quoted in Elliott, Roads and Sts. (2d ed.), §161. See, also, *Campbell v. O'Brien* (1881), 75 Ind. 222, 225; *State v. Hill* (1858), 10 Ind. 219; *Ross v. Thompson* (1881), 78 Ind. 90; *Faust v. City of Huntington* (1883), 91 Ind. 493; *Carr v. Kolb* (1884), 99 Ind. 53; *City of Indianapolis v. Kingsbury* (1885), 101 Ind. 200, 51 Am. Rep. 749; *Town of Marion v. Skillman* (1891), 127 Ind. 130, 11 L. R. A. 55; *Pittsburgh, etc., R. Co. v. Noftsgger* (1897), 148 Ind. 101.

The case before us, so far as the proceedings therein affect the appellant adversely, is not one in which the appellees took the initiative, but is one in which the appellant sought to have his title quieted against the appellees as to the future use of the way so far as it is located on his land.

Besides all the other indications of intention on the part of the appellant that the lane should be a highway, it is to be observed that his action out of which arose the controversy which immediately preceded the bringing of this suit was itself entirely in harmony with such intent; for he was merely reconstructing the fence on the west side of the lane, without attempting to narrow the way substantially. We will not recapitulate the facts already lengthily set forth, by way of abridgement of the special findings. We think that, for the purposes of this case, they would not authorize us to conclude that the court erred in its conclusions thereon. The facts seem sufficient to create an estoppel.

Judgment affirmed.

KAGY v. WESTERN UNION TELEGRAPH COMPANY.

[No. 5,475. Filed January 4, 1906.]

1. **CONTRACTS.—Breach.—Damages Recoverable.**—The defendant who violates his contract with plaintiff is liable for all damages naturally arising or reasonably supposed to be expected to arise from such breach. p. 78.
2. **DAMAGES.—Speculative.—Proximate Cause.—Telegraphs and Telephones.—Failure to Send Message.**—The damages for which defendant telegraph company is liable for its failure to send a message must result from such failure as a proximate cause, and must not be speculative. p. 78.
3. **SAME.—Measure of.—Telegraphs and Telephones.—Failure to Send Message.**—Unless the defendant telegraph company has notice from the sender or from the nature of the message that a failure to send same will be attended with damages none are collectible except the cost of such message. p. 79.
4. **TELEGRAPHS AND TELEPHONES.—Failure to Deliver Message.—Anticipation of Injuries.**—A telegraph company failing to send plaintiff's message to his father: "Come at once prepared to stay. We are both sick," without other warning or notice, can not be presumed to have known that its failure to deliver same would, in the natural course of events, cause a rupture of plaintiff's intestine. p. 79.
5. **SAME.—Failure to Deliver Message.—Anticipation of Injuries.**—Where defendant telegraph company failed to deliver plaintiff's message to his father, informing such father that he and his wife were sick, plaintiff can not recover damages therefor because of plaintiff's being deprived of his father's nursing, when defendant was not apprised that such father was experienced as a nurse. p. 80.
6. **SAME.—Failure to Deliver Message.—Mental Anguish.—Damages.**—A telegraph company is not liable for plaintiff's mental anguish resulting from its negligent failure to deliver a message. p. 81.
7. **SAME.—Failure to Deliver Message.—Mental Anguish Followed by Physical Injury.—Damages.**—No damages are collectible for physical injuries sustained as a result of mental anguish caused by a telegraph company's negligent failure to deliver a message. p. 81.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

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Action by Vetis E. Kagy against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Cox, Reasoner & Ward, for appellant.

Chambers, Pickens, Moores & Davidson, Mitchell & McClintic and George H. Fearons, for appellee.

BLACK, P. J.—The appellee's demurrer for want of sufficient facts to each of the two paragraphs of the appellant's complaint was sustained.

After preliminary matter it was alleged in the first paragraph: That on October 7, 1902, the appellant and his wife were dangerously sick with typhoid fever at their home in Peru, Indiana; that the appellant's father, Leander Kagy, was then living near Bloomville, Ohio, and there existed between the appellant and his father the affection and close relation of father and son, and the appellant became desirous and anxious for the presence of his father, who was an efficient and careful nurse, and had had large experience in nursing the sick, as appellant knew; that nurses competent to treat and wait upon typhoid fever patients were then scarce in Peru and vicinity, and the condition of the appellant and his wife was such that it became necessary to secure a competent nurse and assistant during said sickness; that, for the purpose of securing the immediate presence of the appellant's father, to comfort, nurse and assist the appellant during the sickness, the appellant, on that day, wrote and sent to the appellee's office in Peru, by a special messenger—Sophie M. Kowalk—a dispatch, of which a copy was set out, as follows: "Peru, Indiana. To Leander Kagy, Bloomville, Ohio. Come at once prepared to stay. We are both sick. V. E. Kagy."

It was alleged that the special messenger took this dispatch to appellee's office in Peru, and stated to the agent in charge of the office that she had a message to be sent to Leander Kagy, at Bloomville, Ohio, that Mr. and Mrs.

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Vetis E. Kagy were ill, that appellant's father lived in the country, and she asked the agent what the charges would be, and he informed her that the fee or charge for the transmission of the dispatch to Leander Kagy would be fifty cents, which she, for and on behalf of the appellant, then and there paid, and immediately returned to the appellant and informed him that the message had been delivered as aforesaid; that the appellee thereupon transmitted the dispatch to Bloomville, Ohio; that the agent in the office at Bloomville did not deliver it to Leander Kagy, but immediately sent to the office of the appellee at Peru a service message, set out, which was addressed, "Peru, Indiana," and stated: "Yours to-day to Kagy sqd. Same will you guarantee \$1 delivery charges? • [Signed] Bloomville, Ohio, October 7." It was alleged that the meaning of this message, as known and understood by appellee's agent at Peru, was that the message of the appellant to his father had been received at Bloomville, Ohio, and would be delivered immediately to Leander Kagy at that place, if \$1 charge should be guaranteed by the appellant or some one on his behalf; that the service message was received by appellee's agent at Peru at 5 o'clock, October 7, 1902; that appellant lived at a place described, in Peru, and the appellee's agent had this address, with the copy of the dispatch filed for transmission; that the office was within five squares of the appellant's residence, as appellee's agent knew; that appellant was then ready and willing to pay the \$1 to guarantee delivery; that the message to Leander Kagy could have been delivered in time for him to start for Peru by the night train from Bloomville, if the \$1 for guaranty had been paid; that he was ready and willing to go to assist and nurse the appellant immediately upon the receipt of the telegram; that appellee's agent at Peru negligently received and retained the service message, and negligently failed and refused to notify the appellant that the message

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would not be delivered without the payment of the \$1 guaranty, and negligently failed to notify the appellant that the message to his father had not been delivered; that by reason of the aforesaid negligence of the appellee the appellant believed that the message had been transmitted, and the fee of fifty cents so paid was all and every fee demanded or compensation expected or required by appellee for the transmission and delivery of the message to appellant's father; that appellant, understanding and believing that his father had received the message, expected him to arrive at Peru on October 8; that as train after train arrived from the East, and his father did not come, appellant hourly became more anxious and nervous, his fever became more violent, and, being without any competent nurse, and being compelled, by the nature of his disease, to get into and out of bed, under the control of his anxiety and the depression and despondency caused by the failure of his father to arrive, and by reason of having to get into and out of his bed, appellant, on the 10th day of October, suffered a perforation of an intestine, and suffered a collapse, whereby his temperature dropped from 103 to 97, and his death became imminent, but he afterward rallied, and after many weeks he was able to sit up and so far recovered that at the filing of this complaint he was able to attend to his ordinary affairs, but still suffered incurable and permanent injuries resulting directly from the mental anxiety, depression and despondency caused by the failure of his father to come as requested in said dispatch; that the failure of his father to come as requested, and to arrive on October 8, 1902, was caused directly by appellee's agent's failing and neglecting to inform appellant that a guaranty of \$1 would be necessary; that, by reason of said negligence of appellee's said agent, appellant was deprived of the presence, care and nursing of his father from October 8 until October 11, 1902, and appellant's said collapse and permanent injuries

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were directly caused by the want of nursing and care and the mental anxiety produced by the failure of his father to arrive, as expected, October 8, 1902; that by reason of said anxiety and despondency, and the permanent physical injuries as hereinbefore set forth, appellant suffered great mental and physical anguish, and his health had been permanently injured, to his damage, etc. Wherefore, etc.

In the second paragraph nothing is said about the service message, but it is alleged that the appellee's agent at Peru, to whom the appellant's dispatch was delivered, failed and neglected to transmit and deliver the dispatch to appellant's father until late on the day of October 10, 1902; that the failure of the appellant's father to come as requested, and to arrive on October 8, 1902, was caused directly by the appellee's agent's failing and neglecting promptly to transmit and deliver the telegram; and that by reason of said negligence of the appellee's said agent appellant was deprived of the presence, care and nursing of his father from October 8, 1902 to October 11, 1902, and his said collapse and permanent physical injuries were directly caused by the mental anxiety produced by the failure of his father to arrive as expected on October 8, 1902.

We will direct our attention to the matter discussed by counsel, the character of the appellant's injury and the cause thereof. There is want of clearness, directness and certainty in the complaint, in the statement of the appellant's injuries for which he seeks damages, and the cause or causes thereof. In the first paragraph it is said, however, that the collapse and permanent injuries were directly caused by the want of nursing and care, and by the mental anxiety produced by the failure of the appellant's father to arrive as expected; while in the second paragraph it is said that the collapse and permanent physical injuries were directly caused by the mental anxiety produced by the same failure to arrive.

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The Supreme Court of this State and this Court have approved and followed the rule concerning damages, expressed in *Hadley v. Baxendale* (1854), 9 Exch.

1. 341, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The general principle here laid down is applicable in such cases as the one before us, whether it appear from the form of the pleading to have been intended to de-

2. clare upon contract or in tort, and the special circumstances under which the dispatch is sent, which may thus affect the question of damages, may be stated or indicated by the language of the dispatch, or may be imparted to the telegraph company otherwise. The damages recoverable must result from the default of the defendant as the proximate cause thereof. They may not be remote,

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conjectural or speculative. See *Hadley v. Western Union Tel. Co.* (1888), 115 Ind. 191; *Berkey & Gay Furniture Co. v. Hascall* (1890), 123 Ind. 502, 507, 8 L. R. A. 65; *Lowe v. Turpie* (1897), 147 Ind. 652, 670, 37 L. R. A. 233; *Western Union Tel. Co. v. Ferguson* (1901), 157 Ind. 64; *Acme Cycle Co. v. Clarke* (1901), 157 Ind. 271, 276; *Bierhaus v. Western Union Tel. Co.* (1893), 8 Ind. App. 246; *Western Union Tel. Co. v. Henley* (1899), 23 Ind. App. 14. In 2 Shearman & Redfield, Negligence (5th ed.),

§754, it is said to be settled in a majority of the

3. courts that only the cost of the message can be recovered for failure to transmit a message properly and correctly, unless the telegrapher had notice, from the message itself or from the information furnished with it, that its nondelivery would probably be attended with other damages. See *Western Union Tel. Co. v. Henley*, *supra*, and cases cited therein.

Assuming, for the purposes of the argument, that it could have been sufficiently established by satisfactory evidence that if the appellant had been informed promptly

4. of the receipt of the service message he would have paid the extra charge, and the appellant's dispatch would then have been delivered promptly to his father, and he could and would have safely reached the appellant on the next day, or before his collapse and the rupture of his intestine, and that such injury resulted wholly or in part from the lack of his father's nursing, yet the rupture of an intestine can not fairly and reasonably be considered as arising naturally, according to the usual course of things, from the default of the telegraph company in not promptly delivering such a message as was sent, and it does not appear that the appellee had any information concerning the special circumstances, from which it could reasonably be supposed that such physical consequence from such a cause was contemplated, as a result of its default, at the time of the making of the contract or at the time of the default.

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The person who presented the dispatch to the appellee's agent stated to him that she had a message to be sent to

Leander Kagy, at Bloomfield, Ohio, and that Mr.

5. and Mrs. Vetis E. Kagy were ill, and that the appellant's father lived in the country. Except that the appellant's father lived in the country, and inferentially that he was the addressee, and that the person sick other than the sender was his wife, no information in addition to that contained in the dispatch was imparted to the appellee. The information may perhaps be regarded as sufficient to apprise the appellee that failure to perform its duty by promptly sending and delivering the dispatch would probably result in disappointment, anxiety and "mental anguish" to the sender; but it does not appear that the appellee was notified by the dispatch or otherwise that the person to whom the dispatch was addressed was a careful and efficient nurse, or that he had large experience in nursing the sick, or that the appellee knew of such experience, or that nurses competent to treat the appellant's disease were scarce at Peru and in its vicinity, or that the appellant's condition or that of his wife was such that it had become necessary to procure a competent nurse and assistant, or that the appellant wrote and sent the message to the appellee's office for the purpose of procuring the immediate presence of his father to nurse and assist the appellant during his illness, or that default in the sending or delivery of the dispatch would result in any lack of nursing of the appellant. Whatever may be said in a proper case concerning an averment of the lack of a competent nurse as an adequate proximate cause of such a physical result, the matter is not properly involved in the pleading before us. See *Central Union Tel. Co. v. Swoveland* (1896), 14 Ind. App. 341.

It is now the rule of law in this State, in harmony with the weight of authority elsewhere, that damages can not

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be recovered for mental anguish alone caused
6. through the negligent failure of a telegraph company to deliver a telegraphic message. *Western Union Tel. Co. v. Ferguson* (1901), 26 Ind. App. 213; *Western Union Tel. Co. v. Ferguson* (1901), 157 Ind. 64, 54 L. R. A. 846. That this must be regarded as settled is not disputed in this case; but it is insisted on behalf of the appellant that we should hold that damages may be recovered where physical injury is consequent upon mental anxiety or anguish, as stated in this complaint, and the contention of counsel relates chiefly to this question, it being supposed by counsel for the appellant not to be decided or settled in this jurisdiction.

We need not lengthen this opinion by discussion of the various familiar instances in which mental suffering is admitted without question as an element in the
7. assessment of damages. The question here presented in argument is, whether, in a case where the direct effect of the defendant's negligence is mental anxiety and distress, for which alone no damages are recoverable, however real and manifest the mental disturbance be, there may be recovery for physical consequence of such mental hurt. Every serious mental shock or tension has physical sequences of varying severity and duration, which are immediately connected with and naturally dependent upon the mental disturbance as the cause thereof. If mental injury of such character is so obscure and incapable of satisfactory investigation in a court of justice that it is wise policy not to submit the matter to a jury, the physical depression or irregularity reasonably to be expected therefrom is ordinarily not less difficult of being intelligently apprehended as a measure of damages. In the case before us the alleged consequence was the rupture of an intestine. Even where damages are allowed in such cases, as in some jurisdictions, for mere mental suffering, it is said that they "ought not to be enhanced by evidence of any circumstances which

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could not reasonably have been anticipated as probable from the notice received by the telegrapher.” 2 Shearman & Redfield, Negligence (5th ed.), §756, and cases cited.

Illness arising from the excitement which defamatory language may produce is not, it was held, that sort of damage which forms a ground of action. *Allsop v. Allsop* (1860), 5 H. & N. 534. The court treated the physical illness as it would the mental distress which caused the illness.

In *Kalen v. Terre Haute, etc., R. Co.* (1897), 18 Ind. App. 202, 63 Am. St. 343, where it was alleged that the defendant by its servant negligently let down a gate at a railroad crossing, and thereby the horse, drawing a carriage in which the plaintiff was riding, became frightened, etc., whereby the plaintiff received a severe nervous shock, was greatly frightened, and her life was put in great and imminent peril, and she had suffered great mental pain and anxiety, etc., we held that the complaint did not show a ground for the recovery of substantial damages. We said: “It is not shown that any physical ailment or distress followed as a consequence of the shock, which is not described as enduring, if that would make any difference in the case”—thereby confining the decision to the facts of the particular case.

In *Mitchell v. Rochester R. Co.* (1896), 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. 604, it was said: “Assuming that fright can not form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of the fright, or the extent of the damages.”

In *Braun v. Craven* (1898), 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, where the wrongful conduct of the defendant occasioned the plaintiff's fright, unaccompanied with physical injury, though a nervous shock and subsequent

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illness resulted, it was held that there could be no recovery. See, also, *Ewing v. Pittsburgh, etc., R. Co.* (1892), 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. 709; *Spade v. Lynn, etc., R. Co.* (1897), 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. 393; *Cleveland, etc., R. Co. v. Stewart* (1900), 24 Ind. App. 374, and cases cited therein; *Gaskins v. Runkle* (1900), 25 Ind. App. 584.

We are unable to find any reason for allowing the recovery of damages for physical injury resulting from mental anxiety and suffering, occasioned by negligence, which would not require us to hold the defendant to liability where the consequence of such negligence is mental suffering alone.

Judgment affirmed.

McCORMICK HARVESTING MACHINE COMPANY
v. HINCHMAN.

[No. 5,501. Filed December 5, 1905. Petition to reinstate overruled January 4, 1906.]

APPEAL AND ERROR.—*Appellate Court Rules.*—*Transcript.*—*Index.*
—Where appellant made an index to his bill of exceptions but failed to index the other portions of his transcript, as required by Appellate Court rule three, the appeal will be dismissed.

From Henry Circuit Court; *John M. Morris*, Judge.

Action by the McCormick Harvesting Machine Company against Earl Hinchman. From a judgment for defendant, plaintiff appeals. *Appeal dismissed.*

Eugene H. Bundy, for appellant.

William A. Brown and *Reuben Conner*, for appellee.

BLACK, P. J.—In rule three of this court, relating to the preparation of the transcript on appeal, it is required

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that the appellant "shall prepare an index referring to the initial page of the direct, cross and re-examination of each witness and of each pleading, exhibit and other paper in the record, such index to form the first page of the transcript." This requirement is additional to those in that rule which relate to marginal notes. See Ewbank's Manual, p. xlvi.

The appellee in his brief filed in due time, February 10, 1905, directed attention to the appellant's failure to comply with this requirement. Upon examination we find that while there is an index to the bill of exceptions containing the evidence, inserted immediately before the bill, there is no index of the other portions of the record, the transcript of which consists of twenty-seven typewritten pages preceding that bill of exceptions. The appellee claims that this is a failure to comply with the rule, for which he asks that the appeal be dismissed. We are not at liberty to ignore this suggestion. The matter is in all essential respects the same as that involved in the decision in *State, ex rel., v. Lankford* (1902), 158 Ind. 34. See, also, *Dixon v. Poe* (1902), 158 Ind. 54; *Peterson v. Union Trust Co.* (1903), 160 Ind. 700; *Smith v. Sutton* (1904), 32 Ind. App. 362; *State v. Patton* (1902), 159 Ind. 248. There does not appear to have been any effort on the part of the appellant to cure this defect.

Appeal dismissed.

NEW CASTLE BRIDGE COMPANY v. DOTY.

[No. 5,586. Filed January 5, 1906.]

1. TRIAL.—*Negligence.—Contributory.—Defense.*—The plaintiff in a personal injury case, under the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) has established his case when he has proved defendant's negligence and proximately resultant injuries to himself. p. 86.

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2. **TRIAL.—Burden of Proof.**—The party who would lose if no evidence were given on a proposition has the burden of proof on such proposition. p. 86.
3. **SAME.—Affirmative Defenses.—Burden of Proof.**—The law casts upon a defendant who asserts an affirmative defense the burden of proving such defense. p. 86.
4. **SAME.—Instructions.—Burden of Proof.—Contributory Negligence.**—An instruction that the burden of proving contributory negligence in a personal injury case is on the defendant is correct. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274; *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247; *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569, *contra*. p. 87.
5. **SAME.—Instructions.—Duty to Request.—Contributory Negligence.—Evidence.**—If defendant desires the jury to be instructed that they may consider plaintiff's evidence on the question of contributory negligence, it is his duty to request such an instruction. p. 88.
6. **APPEAL AND ERROR.—Erroneous Ruling Precedent.—Transfer.**—Where the Appellate Court deems a ruling precedent erroneous, it will transfer the cause to the Supreme Court. p. 89.

From Morgan Circuit Court; *Joseph W. Williams*, Judge.

Action by Arthur W. Doty against the New Castle Bridge Company. From a judgment for plaintiff, defendant appeals. (On transfer, see 168 Ind. —.) *Transferred to Supreme Court.*

E. E. Stevenson and *O. Matthews*, for appellant.

Charles F. Remy, *John W. Donaker* and *Renner & McNutt*, for appellee.

ROBY, C. J.—Action to recover damages on account of alleged personal injuries. Verdict and judgment for plaintiff. One ground stated in the motion for a new trial is based upon the giving of the following instruction: "(8) I instruct you that as the law now exists in Indiana the plaintiff is not bound to prove that he was free from fault in receiving his injuries. The question of contributory negligence is now a matter of defense, and the burden is cast upon the defendant to prove by a fair preponderance

of the evidence that the plaintiff, Arthur W. Doty, was guilty of some act or acts of negligence that contributed to his injuries, or that he did not use such care or caution as a reasonably prudent person would have done, under the circumstances, before this action can be defeated for contributory negligence alone, if he has otherwise proved his case.”

Since February 17, 1899, contributory negligence on the part of the plaintiff is a matter of defense. Acts 1899, p. 58, §359a Burns 1901. That the defense may

1. be made under a general denial, by legislative permission, does not change its affirmative character. The plaintiff makes his case when he proves negligence on the part of the defendant and resulting damage to him. §359a, *supra*; *Pittsburgh, etc., R. Co. v. Lightheiser* (1904), 163 Ind. 247, 263.

The issue must be proved by the party who states an affirmative. One test is: which party would prevail if no evidence, or no more evidence, were given? *Meikel*

2. *v. State Sav. Inst.* (1871), 36 Ind. 355, 358; *Lindley v. Sullivan* (1893), 133 Ind. 588; Bailey, Onus Probandi, 1. If the plaintiff introduces evidence tending to show negligence by the defendant and resulting damage, he will recover if no more evidence is given, so that the instruction under consideration is logically correct.

The cases are numerous in which the burden of proof has been held to be upon the defendant who relies upon an affirmative defense. The instruction under consider-

3. ation would be strictly accurate in a case where the defendant was relying upon payment, fraud, failure of consideration, duress, estoppel, illegality, release, tender, etc., as has been many times ruled and never denied by the Indiana Supreme or Appellate Courts. If an exception to this well-defined principle is to be made, where the affirmative defense relied upon consists of a charge of negligence against the plaintiff, there must be some reason for

such exception, and it is not believed that any such reason can be stated or found. The question is not a new one. While the decisions of the courts of sister states and of the United States are not authoritative in the strict sense of the term, they possess great persuasive power, and we would be loath to declare a rule conflicting with that universally laid down by them.

Contributory negligence has always been treated as a defense in the federal courts. The exact question under consideration in this case, when presented to the

4. United States Supreme Court, was disposed of as follows in *Indiana, etc., R. Co. v. Horst* (1876), 93 U. S. 291, 23 L. Ed. 898: "The instruction contained two elements: (1) That the burden of proof rested on the defendant. This was correct. *Washington, etc., R. Co. v. Gladmon* [1872], 15 Wall. 401, 21 L. Ed. 114. (2) That 'it' meaning contributory negligence, could 'not avail the defendant, unless established by a preponderance of the evidence.' This, also, was correct. The court did not say that if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might without it be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof, or insufficient proof, on the subject, there was a fatal defect in his case. It was, therefore, eminently proper to say upon whom the burden of proof rested; and this was done without in anywise neutralizing the effect of the testimony the plaintiff had given, if there were any, bearing on the point adversely to him. We think the instruction was properly expressed. If there was any ambiguity unfavorable to the defendant, it was the duty of his counsel

to bring it to the attention of the court, and ask its correction." See *Washington, etc., R. Co. v. Harmon* (1892), 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; *Washington, etc., R. Co. v. Gladmon, supra*; *Inland, etc., Coasting Co. v. Tolson* (1891), 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Watkins v. Southern Pac. R. Co.* (1889), 38 Fed. 711, 4 L. R. A. 239; *Western Union Tel. Co. v. Eyser* (1873), 2 Colo. 141, 154; *Sanders v. Reister* (1875), 1 Dak. 151, 172, 46 N. W. 680; *Hopkins v. Utah, etc., R. Co.* (1887), 2 Idaho 300, 13 Pac. 343; *Baltimore, etc., R. Co. v. Whittington* (1878), 30 Gratt. 805; *Norfolk, etc., R. Co. v. Burge* (1887), 84 Va. 63, 4 S. E. 21; *Southwest Improvement Co. v. Andrew* (1889), 86 Va. 270, 9 S. E. 1015; *Gadonnx v. New Orleans R. Co.* (1904), 128 Fed. 805; *Hemingway v. Illinois Cent. R. Co.* (1902), 114 Fed. 843, 52 C. C. A. 477; *Chicago, etc., R. Co. v. Price* (1899), 97 Fed. 423, 38 C. C. A. 239. The instruction is therefore not only logically correct and in accord with those approved in analogous cases, but it is supported by the decisions of the courts of those jurisdictions in which the plaintiff is not required to negative contributory negligence as part of his case.

It seems scarcely necessary to say that an instruction stating who has the burden of proof has nothing to do with the character of evidence necessary to discharge

5. such burden. That is an entirely different matter.

If the defendant wishes the jury to be told that it should consider circumstantial, as well as direct, evidence bearing upon the issue, he may ask an instruction to that effect, but can not be heard to allege error in the instruction relating to the burden of proof, because it was not qualified by a reference to circumstantial evidence. If a jury need to be told that it should consider all the evidence upon a given proposition, whether introduced by one party or the other, an instruction to that effect may be asked, but the instruction as to the burden of proof can not be held

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bad for failure to include in it a reference to this irrelevant proposition. To say that a party has the burden of proof is exactly the same as saying that the duty of proving the facts in dispute rests upon him. 1 Bouvier's Law Dict., title, Burden of Proof; *Ex parte Walls* (1878), 64 Ind. 461, 472. If the burden of proof to establish contributory negligence rests upon any one, it rests upon the defendant; and, so resting, the instruction under consideration was technically accurate. Appellant cites and relies upon the following cases: *Indianapolis St. R. Co. v. Taylor* (1902), 158 Ind. 274; *Pittsburgh, etc., R. Co. v. Lightheiser* (1904), 163 Ind. 247; *Pittsburgh, etc., R. Co. v. Collins* (1904), 163 Ind. 569. What was said on the subject under consideration in the case of *Indianapolis St. R. Co. v. Taylor, supra*, was extrajudicial, not made the basis of the decision, and evidently not carefully considered by the court. The case of *Pittsburgh, etc., R. Co. v. Lightheiser, supra*, followed the dictum of the case of *Indianapolis St. R. Co. v. Taylor, supra*; and the case of *Pittsburgh, etc., R. Co. v. Collins, supra*, followed the Lightheiser case.

The instruction in this case might be held harmless as was done in *Indianapolis, etc., Transit Co. v. Haines* (1904), 33 Ind. App. 63, but it ought not to be necessary to declare a good instruction harmless in order to avoid reversing a judgment because of such instruction having been given, and the time to correct an inadvertence is before it has been so long acquiesced in as to become *stare decisis*.

The cause is therefore transferred to the Supreme Court, with a recommendation that the cases last cited, so far as they may be construed as not in accordance with the principle heretofore stated, should be overruled.

Wiley, Myers and Robinson, JJ., concur. Black, P. J., and Comstock, J., absent.

Muncie, etc., R. Co. v. Ladd—37 Ind. App. 90.

MUNCIE, HARTFORD & FT. WAYNE RAILWAY
COMPANY v. LADD.

[No. 5,485. Filed January 5, 1906.]

1. *TRIAL.—Instructions.—Credibility of Witnesses.—Invasion of Province of Jury.*—The weight and credibility of testimony are questions exclusively for the jury, and an instruction stating that some testimony is of greater weight than other testimony is an invasion of the province of the jury. p. 93.
2. *SAME.—Instructions.—Credibility of Witnesses.—Interest.—Invasion of Province of Jury.—Curing Error.*—An instruction that “as a general rule a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not interested” is an invasion of the province of the jury, and such error is not cured by a further statement in such instruction that “the degree of credit to be given to each and all of the witnesses is a question for the jury alone to determine.” p. 94.

From Randolph Circuit Court; *J. W. Macy*, Judge.

Action by Richard Ladd against the Muncie, Hartford & Ft. Wayne Railway Company. From a judgment on a verdict for plaintiff for \$800, defendant appeals. *Reversed.*

James W. Brissey, Bracken & Bracken, A. L. Nichols, A. L. Bales and J. P. Goodrich, for appellant.
A. R. Templer, for appellee.

ROBINSON, J.—Action by appellee for damages for a personal injury. Upon a trial the jury returned a verdict for appellee, and also answers to interrogatories. Appellant assigns as error, overruling the demurrer to each of the paragraphs of complaint, overruling its motion for judgment on the answers to interrogatories and overruling its motion for a new trial.

Among others, the court gave to the jury the following instruction: “(4). You are the judges of the credibility of witnesses and the weight to be attached to the testimony

of each and all of them. In determining the weight to be given to the testimony of the different witnesses in this case, it is proper for the jury to consider the relationship of the witnesses to the parties, if the same be true, their temper, feeling and bias, if any have been shown; their demeanor while testifying, their apparent intelligence and their means of information, and to give such credit to the testimony of each witness as, under all the circumstances, such witness seems to be entitled to. In determining the issues in this case you should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to. When witnesses are otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information are superior. While it is your duty carefully to scrutinize and weigh the evidence of all the witnesses in the case, still it is your sworn duty to give proper credit to the evidence of each and all the witnesses, and, if possible, to reconcile all the evidence in the case with the presumption that each witness has intended to speak the truth. The credit of a witness depends upon two things—his ability to know what occurred and his disposition for telling the truth as to the occurrence. One of the tests for telling the credibility of a witness is his interest in the result of the suit. As a general rule, a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not interested; but the degree of credit to be given to each and all of the witnesses is a question for the jury alone to determine. While you are the judges of the evidence, it is your duty to take the law as given you by the court."

The first paragraph of complaint avers that appellant is an interurban electric railway company carrying passengers for hire; that stop Five, a station on appellant's line,

is constructed by having set on edge large planks three inches thick and eight or ten inches wide and ten to fifteen feet long in the form of a square and filled with cinders; that on the night of April 15, 1903, appellee took passage and paid his fare to stop Five; that it was 11:15 o'clock p. m. and very dark; that the car stopped at stop Five, and appellee started to leave the car; that, while on the last step and in the act of stepping off, appellant's servants in charge of the car, without appellee's knowledge and without any warning, and while appellee was stepping from the car, carelessly and negligently started the car with a jerk, throwing appellee to the ground and against the edge of the platform, causing injuries; that appellant's act in starting the car without first warning appellee and without appellee's knowledge and before he had reasonable time to leave the car and descend from the same to the platform was the cause of the injuries.

The second paragraph is substantially the same as the first, except it is averred that at the time of the injury appellant had neglected to fill the hollow square with cinders or any other substance, and had negligently placed the unfilled structure, the top of which was eight or ten inches from the top of the ground, at a distance of not to exceed eighteen inches from the car steps.

Whether appellee's injuries were caused by the negligence of appellant in starting the car with a jerk, without warning, and before appellee had time to get off the car, were essential facts of appellee's case. This claim is supported by the testimony of appellee and another witness, while the testimony of appellant's witnesses is to the effect that the car remained standing for a minute or more, that warning was given of the starting of the car, and that it started slowly and gradually. Appellee's counsel concede in their brief that the evidence is contradictory and give the rule as to weighing the evidence. The same is true concerning the evidence of witnesses as to whether the in-

juries received by appellee were permanent or temporary. To determine these questions the jury were required to believe some witnesses and to disbelieve others. One of the appellee's witnesses was the only witness who testified that he saw appellee as he was alighting from the car.

In *Winklebleck v. Winklebleck* (1903), 160 Ind. 570, the court instructed the jury as follows: "That when witnesses are otherwise equally creditable, and their

1. testimony otherwise entitled to equal weight, a greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge, or to a want of recollection." In holding this instruction erroneous the court said: "It was the exclusive right of the jury to determine this conflict for themselves, and in the doing of it to give to the testimony of each witness the weight and credit they believed him entitled to, as tested by their individual experiences in human conduct. It is the duty of the court to aid the jury by calling their attention to such facts and circumstances as may reasonably and naturally be expected to throw light upon the truthfulness or falsity of statements of witnesses, and also to caution the jury against the consideration of such things as the law forbids; but within the limits of their proper range the jury must be left free to decide, each for himself, what witness or class of witnesses is entitled to the greater consideration. This has always been the law in this State, and an instruction in the precise language of that under consideration has been held erroneous. *Jones v. Casler* [1894], 139 Ind. 382, 395, 47 Am. St. 274. For reasons given above we are unable to say how far, if at all, the jury were influenced in their finding by the charge complained of, and hence unable to say that appellant was not damaged thereby." See *Woollen v. Whitacre* (1883), 91 Ind. 502; *Cline v. Lindsey* (1887), 110 Ind. 337; *Durham v. Smith*

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(1889), 120 Ind. 463; *Duvall v. Kenton* (1891), 127 Ind. 178, and cases cited.

That part of the instruction which says that “as a general rule, a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony

2. as one who is not interested; but the degree of credit to be given to each and all of the witnesses is a question for the jury alone to determine,” is also objectionable. Appellee was the only witness who testified who had a pecuniary interest in the result of the suit, and if the jury must necessarily have understood that the interest referred to was a pecuniary or direct interest appellant could not complain of the instruction. But there are few lawsuits, in which a number of witnesses testify, in which it is not sought to show, for the purpose of affecting their credibility, that some of the witnesses have been, during the trial, taking an active interest, although they will have no pecuniary or direct interest in the result of the suit. Whether an interested witness will be an honest witness or a dishonest witness—and he must be one or the other—is not a matter of law. If the statement be true at all, it is not a legal presumption, but a matter of fact of which the jury in each particular case are the exclusive judges. See *Veatch v. State* (1877), 56 Ind. 584, 26 Am. Rep. 44; *Greer v. State* (1876), 53 Ind. 420. It is true in the above cases the instruction had reference to the defendant’s testimony, and the instructions called attention to the fact that he had been a witness in his own behalf. But the reason given for holding the instruction erroneous is applicable in the case at bar. In the instruction now in question, the statement that the degree of credit to be given each and all witnesses is a question for the jury alone does not render harmless the statement immediately preceding, for the reason that the court states, as matter of law, the degree of credit that must usually be given witnesses in different situations, and closes the instruction with the statement

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that, while the jury are the judges of the evidence, it is their duty to take the law as given by the court. The motion for a new trial should have been sustained.

Judgment reversed.

Roby, C. J., Myers and Wiley, JJ., concur. Black, P. J., and Comstock, J., absent.

WHITE v. THE STATE.

[No. 5,841. Filed January 9, 1906.]

1. **CRIMINAL LAW.—Statutes.—Gambling.—Dice.—Indictment and Information.**—An indictment charging defendant with keeping and exhibiting for the purpose of gain a certain gambling device known as “dice” states a public offense under §2181 Burns 1901, §2086 R. S. 1881, providing that it shall constitute a crime for any person to keep or exhibit for gain “any gaming table * * * or any gambling apparatus, device, table or machine of any kind or description, under any denomination or name whatever.” p. 97.
2. **TRIAL.—Instructions.—Burden of Proof.—Clerical Errors.**—Where the trial court in a misdemeanor case gave an instruction that the burden of proof was on “defendant” to prove every material allegation of the indictment beyond a reasonable doubt, but in other instructions the court properly instructed the jury that the State must establish its case, such clerical error is harmless. p. 100.
3. **SAME.—Instructions.—How Considered.**—Where the instructions considered as a whole fairly present the case to the jury, insubstantial errors are harmless. p. 101.
4. **SAME.—Instructions.—Criminal Law.—Consideration of Evidence.**—Where the trial court instructed the jury in a criminal case that the presumption of innocence prevails until the close of the trial, and the jury should weigh the evidence in the light thereof and reconcile the proof with such presumption if it could be done consistently with the law and the evidence and “your duty as jurors,” such last clause does not constitute reversible error by placing on the jury a duty unauthorized by law. p. 101.
5. **SAME.—Instructions.—Clerical Omissions.**—An instruction charging the jury in a criminal case that it was for them to “determine what has been proved and what has been proved on the trial” is not harmful to defendant since the omission of the word “not” could not be misleading. p. 102.

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6. **TRIAL.**—*Instructions.*—*Clerical Omissions.*—An instruction charging the jury in a criminal case that “this is a prosecution * * * charging the defendant, Henry White, keeping and exhibiting a gaming device” is not reversible because of the clerical omission of the word “with” preceding the word “keeping,” no injury being shown. p. 102.
7. **SAME.**—*Criminal Law.*—*Argument of Counsel.*—A statement by the prosecuting attorney in his argument to the jury that defendant’s motion to quash the indictment had been overruled, while not legitimate argument, was justifiable in view of the fact that the counsel for defendant had stated in argument that if the State had proved the allegations of the indictment it was not entitled to a verdict because the indictment did not state an offense against the law, since for the purpose of the trial that question was foreclosed by the trial court’s ruling on the motion to quash. p. 103.
8. **SAME.**—*Criminal Law.*—*Argument of Counsel.*—A statement by the prosecuting attorney in his argument to the jury that “Lew Trees [a merchant for whom defendant was clerking] was related to Eph. Marsh and Jonas Walker,” they being of counsel for defendant, is not reversible error though the evidence thereof was lacking, no injury being shown. p. 104.

From Hancock Circuit Court; *Edward W. Felt*, Judge.

Prosecution by the State of Indiana against Henry White. From a judgment of conviction, defendant appeals. *Affirmed.*

Binford & Walker and *W. W. Cook*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild*, *W. C. Geake* and *Charles L. Tindall*, for the State.

WILEY, J.—Appellant has appealed from a judgment of conviction declaring him guilty of keeping and exhibiting a gaming device. His motions to quash the indictment, in arrest of judgment, and for a new trial were overruled. In his assignment he predicates error on the overruling of his motion to quash and his motion for a new trial.

Omitting the formal parts, the indictment charges that on a certain day appellant “did then and there keep and

exhibit, for the purpose of gain and to play games

1. thereon and therewith, by which to win money, cigars, tobacco, beer and other property of value by and from divers persons who might be induced to wager money, cigars, tobacco, beer and other property of value thereon, a certain gambling device commonly known as dice, contrary," etc. The statute upon which the indictment is based is §2181 Burns 1901, §2086 R. S. 1881, which is as follows: "Whoever keeps or exhibits for gain, or to win or gain money or other property, any gaming table * * * or any gambling apparatus, device, table or machine of any kind or description, under any denomination or name whatever; * * * or allows the same to be used for any such purpose, shall be fined," etc.

Counsel earnestly contend that the indictment does not state a public offense. That portion of the statute quoted is certainly broad and comprehensive enough to cover almost any kind of a gambling device. The purpose of the statute is, and the evident intent of the legislature in passing it was, to remove as far as possible the temptation for gambling, and prevent the evils arising therefrom. It will be observed that the statute creates no absolute inhibition against keeping or exhibiting the contrivances, devices, etc., specified, except when they are kept for "gain, or to win or gain money or other property." Keeping or exhibiting such devices, etc., for gain, constitutes the statutory offense. The statute is so broad and sweeping that it includes "any gambling apparatus, device, * * * of any kind or description, under any denomination or name whatever." This language certainly covers and includes any kind of apparatus, table, device, etc., which is kept or exhibited for gain, or to win or gain money or other property. If the word "dice" may be classed or comes within the meaning of "any gambling * * * device," then it is embraced within the statute. The indictment charges that appellant

kept and exhibited a "certain gambling device commonly known as dice." This charge tenders an issuable fact within the meaning of the statute.

It is, however, urged by appellant's learned counsel that where a statute designates certain definite and specific things as unlawful, such as Jenny Lind table, roulette, faro, keno, wheel of fortune, etc., and contains a further inhibition in general terms, such general inhibition will be construed to include only games of a nature or kind similar to those specifically prohibited. This is upon the ground that the rule *ejusdem generis* applies. For this reason it is urged that under the specific language of the statute, whereby certain contrivances, devices, etc., are named, the general provision which embraces "any gambling apparatus, device, * * * under any denomination or name whatever," can not be construed to mean "dice." A number of cases are cited to support this contention, a brief review of which will suffice to show that they are not of controlling influence here.

In *Commonwealth v. Kammerer* (1890), 11 Ky. Law 777, 13 S. W. 108, the indictment charged that appellee did "unlawfully and feloniously set up, carry on and conduct a machine and contrivance used in betting, to wit: a game of oontz, played with dice and upon which money was won and lost." The statute under which he was indicted was in substance as follows: "Whoever, * * * shall set up, carry on or conduct, * * * a keno bank, faro bank, or other machine or contrivance used in betting, * * * shall be fined," etc. It was shown by the evidence that the game that was played was "craps" or "oontz." It was held that where a game of "oontz" is played with dice on a table or other surface, by bettors, it did not come within the meaning of the terms, "other machine or contrivance," as used in the statute. It was recognized in that case that dice are often resorted to and used for gaming, but to play "oontz" with dice upon a table or

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other surface was not embraced within the words "other machine or contrivance used in betting." There is a wide difference between the Kentucky statute and the one under which this prosecution is waged.

In *State v. Hardin* (1863), 1 Kan. 474, it was held that a "pack of cards" was not a gambling device within the meaning of the statute which prohibited the keeping of specifically designated devices, adopted, devised and designed for the purpose of playing games of chance.

In *State v. Gilmore* (1889), 98 Mo. 206, 11 S. W. 620, it was held that ordinary playing cards and poker chips were not gambling devices within the meaning of the statute which prohibited the setting up and keeping of certain specific gambling devices, such as faro banks, roulette, keno, etc., and were not embraced within the expression "any kind of gambling table or gambling device."

State v. Etchman (1904), 184 Mo. 193, 83 S. W. 978, is not in point, for the only question there decided was that the indictment did not charge any crime defined by the statute.

In *Chappell v. State* (1889), 27 Tex. App. 310, 11 S. W. 411, appellant was indicted for keeping for the purpose of gaming "a table used for gaming, to wit, for playing a game with dice, commonly called craps," etc. While the indictment was held good because it came within the spirit and letter of the statute, the judgment of conviction was reversed, because the evidence showed that the table was an ordinary table, that the game played on it was "craps," and that such game had no relation to the table.

These authorities do not support appellant's contention, for they are not applicable to our statute and the facts charged in the indictment.

Appellant's position that dice are not gaming devices is not tenable. Webster defines dice as follows: "Small cubes used in gaming, or in determining by chance." We can conceive of no use to which dice can be put except for the

purpose of playing games or to determine by chance. In one state at least (Minnesota) dice are recognized as gaming devices, and are classed and prohibited under the same statute with other gaming devices. Thus in *State v. Shaw* (1888), 39 Minn. 153, 39 N. W. 305, dice, together with gaming tables, are referred to "as well-defined devices used in gambling."

In Missouri it was held that "craps" played with dice upon a table was a gambling device, and was prohibited under that clause of the statute which prohibited any kind of a gambling table or gambling device adapted, devised and designed for the purpose of playing games of chance for money. *State v. Rosenblatt* (1904), 185 Mo. 114, 83 S. W. 975.

The offense defined by our statute is keeping or exhibiting for gain, or to win or gain money or other property, any "gaming table * * * or any gambling apparatus, device, table or machine of any kind or description, under any denomination or name whatever * * * for the purpose of betting or gaming," etc. Having reached the conclusion that "dice" are gambling devices, within the meaning of the statute, and the indictment having charged that appellant did keep and exhibit for the purpose of gain and to play games therewith, etc., a "certain gambling device commonly known as dice," we are clearly of the opinion that the indictment states a misdemeanor, as defined by statute, and is good as against a motion to quash.

Under the motion for a new trial, among other things, appellant bases error upon the court's giving certain instructions. By the fourth instruction the court told

2. the jury that the burden was upon the "defendant" to prove every material averment of the indictment beyond a reasonable doubt. This, of course, was erroneous, but we must presume that the trial court by oversight or inadvertence used the word "defendant" when it intended to use the word "State." It was evidently a clerical error.

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In the following instruction the court fully instructed the jury that appellant was presumed to be innocent, and could not be convicted unless the State proved his guilt beyond a reasonable doubt. The instruction further particularized by telling the jury what would be necessary for the State to prove to warrant a conviction, and covered every material averment of the indictment. The sixth, seventh and thirteenth instructions so modified the fourth, and made so plain to the jury their duty, that we are satisfied appellant was not harmed by the use of the word "defendant" in the fourth instruction.

The fifth, tenth and eleventh instructions are criticised because they proceed upon the theory that keeping and exhibiting dice for gaming purposes and to win

3. money or other property of value constitute an offense, within the meaning of the statute, while it is claimed by appellant that keeping and exhibiting dice, etc., are not included in the statute, and because the instructions do not say that such device was "adapted, devised and designed for gambling." As to the first objection, we have disposed of that in what we have said as to the sufficiency of the indictment. As to the second, the question is fully covered by the instructions when considered together.

In the fifteenth instruction the court told the jury that the presumption of innocence prevails until the close of the trial; that they should weigh the evidence in the

4. light of such presumption, and reconcile the same with such presumption, if it could be done, "consistently with the law and the evidence * * * and your duty as jurors." Objection to the latter clause was made, upon the ground that it places upon the jury "a duty which is not authorized by law." No possible harm could come to appellant by the language quoted.

In the sixteenth instruction the jury were told that they were the exclusive judges of the evidence and the credibility

of the witnesses, and it was for them to "determine

5. what has been proved and what has been proved on the trial." It is claimed that the instruction is erroneous because of the omission of the word "not" between "has" and "been" in the second use of the words. Of course the court intended to say that it is the duty of the jury to determine what has been proved and what has not been proved, but for the clerical omission of the word "not" we are clear that the jurors were not misled, and that they fully understood what the court meant.

The first instruction simply stated to the jury that "this is a prosecution * * * charging the defendant, Henry White, keeping and exhibiting a gaming device."

6. The word "with," which should immediately precede the word "keeping," is omitted, and the instruction is criticised for such omission. There is no merit in this criticism. Considering the instructions as a whole, as we must, they fairly state the law applicable to the facts in the case, and we are not able to say that appellant was in anywise prejudiced by them.

The only remaining question which counsel for appellant have discussed, and to which they have devoted over twenty pages of their brief, is the alleged misconduct of the prosecuting attorney in his argument to the jury. The record shows that the argument on both sides was not conducted altogether within legitimate bounds. There was much bitterness, feeling and vituperation injected into the argument, and counsel did not at all times keep within the record. Appellant excepted to many statements of the prosecuting attorney, and moved to discharge the jury. This motion was overruled and exceptions reserved. The court sustained all but two of appellant's objections to the several objectionable statements, and at the time instructed the jury to disregard them. In its general instructions it also referred to the matter, and told the jury that they should determine the merits of the case solely upon the law and the evidence. It would require too much time and

space to consider separately the many statements of the prosecuting attorney to which objections were made, and, in view of the fact that the court acted promptly and fairly at the time, we are satisfied that appellant was not prejudiced thereby.

The two statements which the court refused to interfere with, in view of the earnest and able argument of appellant's counsel, ought, in all fairness, to be consid-

7. ered. During his closing argument the prosecuting attorney stated that the motion to quash the indictment had been overruled. This statement was not within the range of legitimate argument, and should not have been made. While, in a criminal case, the jury are the judges both of the law and evidence, they have nothing to do with the sufficiency of the indictment. That is a matter solely for the court. *Anderson v. State* (1886), 104 Ind. 467. This statement, however, was provoked by and in answer to an improper statement made in argument by one of appellant's counsel. In that statement counsel said in substance that if the State had proved the allegations in the indictment it was not then entitled to a verdict of conviction, because the indictment "did not state an offense against the law," for the reason that dice were not gaming devices within the meaning of the law, and that appellant could not be punished for exhibiting dice as a gaming device. When the trial court held that the indictment was good as against a motion to quash, it adjudicated, so far as that court was concerned, that it stated an indictable offense. It was the duty of both the State and appellant, for the purpose of the trial, to accept that adjudication as final, and appellant's counsel was not justified in saying to the jury what he did. Under these facts we are inclined to the view that the prosecuting attorney was justified in answering the statement as he did. It was the only effectual means of meeting and refuting the force of what appellant's counsel had said.

The remaining question relates to the statement of the prosecuting attorney that "Lew Trees was related to Eph. Marsh and Jonas Walker"—they being of counsel

8. for defendant. Objection is urged to this statement, because there was no evidence of such relationship. It is proper to say that appellant was clerking for Lew Trees, and that it was in the latter's store where the alleged offense was committed. It may be conceded that this was an improper statement, but we are unable to see how it was hurtful. In *Morrison v. State* (1881), 76 Ind. 335, 343, the court said: "If, for every transgression of the prosecuting attorney beyond the bounds of logical or strictly legal argument, the defendant could claim a new trial, few verdicts could stand, and the administration of criminal justice would become impracticable." To the same effect is the case of *Combs v. State* (1881), 75 Ind. 215.

Upon the record, a correct conclusion was reached in the trial court, and we do not find any reversible error. Judgment affirmed.

HAYES ET AL. v. LOCUS ET AL.

[No. 5,460. Filed January 9, 1906.]

APPEAL AND ERROR.—Assignment of Errors.—Motion to Dismiss Appeal.—Waiver.—Where the error assigned is, that the trial court erred in sustaining defendants' demurrer and rendering judgment, no question is presented; and the fact that an appellee failed to move to dismiss such appeal until after the expiration of the time for filing its brief is not a waiver of its right to a dismissal.

From Howard Superior Court; *B. F. Harness*, Judge.

Suit by William J. Hayes and others against Dillon Locus and others. From a decree for defendants, plaintiffs appeal. *Appeal dismissed.*

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Willits & Voorhis, for appellants.

Bell & Purdum and *John L. Rupe*, for appellees.

PER CURIAM.—This appeal having been dismissed, upon the motion of the appellants, as to all the appellees except the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, a motion to dismiss the appeal has been presented by that company. In the assignment of errors the specifications are like those which we held to be not sufficient to present any question in *Spitzer v. Miller* (1905), 35 Ind. App. 116. It is claimed on behalf of the appellants that this motion of the solè remaining appellee to dismiss comes too late, inasmuch as a long period has elapsed since the submission of the cause in this court, and after the time for the filing of a brief for such appellee on the merits; but, the assignment of errors being so defective as not to present any question upon the merits, the appeal upon final hearing would be dismissed by the court without any motion therefor. Therefore there has been no waiver of the right of such appellee to the dismissal.

Appeal dismissed.

THE STATE v. CLARK.

[No. 5,860. Filed January 9, 1906.]

CRIMINAL LAW.—*Indictment and Information.*—*Amendments.*—*Statutes.*—The criminal code of 1905 (Acts 1905, p. 584) does not apply to prosecutions begun prior to its taking effect; and where an affidavit, in an appeal from a justice of the peace, is quashed in the circuit court, such affidavit being filed before the taking effect of said act of 1905, the State has no right to amend such affidavit under said act of 1905 (Acts 1905, pp. 584, 622, §172).

From Grant Circuit Court; *H. J. Paulus*, Judge.

Prosecution by the State of Indiana against Mamie Clark. From a judgment quashing the affidavit, the State appeals. *Appeal not sustained.*

Charles W. Miller, Attorney-General, *William C. Geake*,
C. C. Hadley and *L. G. Rothschild*, for the State.

Todd & Rauch and *Manly & Stricler*, for appellee.

ROBINSON, J.—Appellee was prosecuted before a justice of the peace for a criminal offense, charged to have been committed on or about March 16, 1905, and upon a trial by jury a verdict of guilty was returned, and a fine assessed. An appeal was taken to the circuit court, and on April 27, 1905, appellee's motion to quash the affidavit was sustained, and leave was asked and granted to amend. Afterward, May 1, 1905, the seventh judicial day of the April term, 1905, the prosecuting attorney "asks leave to file an amended affidavit, and offers to file same, to which the defendant at the time objects; which said affidavit reads in the words and figures following, to wit." This is followed by copy of the affidavit offered to be filed. Afterward, on the fifty-ninth day of the same term, the court "overrules the request of the prosecuting attorney to amend the affidavit, to which ruling of the court the State at the time excepts; and five days' time is given within which to prepare and file a bill of exceptions. And said defendant, Mamie Clark, is discharged from custody. And now said plaintiff prays an appeal."

The offense was committed and prosecution begun before the criminal code of 1905 (Acts 1905, p. 584) was in force. The offer to file the amended affidavit was made while appellee was still in custody under the proceedings originally commenced. It can not be said that the offer to file the affidavit was the beginning of a new prosecution. The offer to amend was not made until after the motion to quash had been sustained. At that time there was no affidavit on file which could be amended. The right to amend a complaint after a demurrer has been sustained exists by virtue of the statute. While the right is given by statute to amend an information and affidavit (§1804 Burns 1901, §1735 R. S. 1881), the statute does not give this right

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after a motion to quash has been sustained. In such case the following provision is made by §1829 Burns 1901, §1760 R. S. 1881: "If the motion to quash be sustained, the defendant shall not be discharged, unless the court should be of the opinion that the objection can not be avoided by a new indictment or by a new or amended information and affidavit. And in case an indictment is quashed, the court shall direct the case to be resubmitted to the grand jury which found the indictment, or to another grand jury, or the court may direct the prosecuting attorney to prepare and file an information, upon a proper affidavit, against the defendant, charging him with the offense in proper form; and like proceedings shall be had in case an information is quashed, and the same can not be amended without a new affidavit. And the court must detain the defendant in custody, or recognize him with sufficient surety, if the offense be bailable, to answer to the offense, and, if necessary, recognize the witnesses to appear and testify."

This section requires an information and affidavit. It does not appear that these requirements were complied with. A new affidavit was offered, but no offer was made to file an information and a new affidavit. The criminal code of 1905 (Acts 1905, p. 584, §172, §1813 Burns 1905) requires the filing of an affidavit only, and dispenses with the information; but, as the prosecution was under the old code, the filing of an information and affidavit both was necessary to give the circuit court jurisdiction.

Appeal not sustained.

McCORMICK ET AL. v. HIGGINS, ADMINISTRATOR.

[No. 5,590. Filed January 10, 1906.]

TRIAL.—Instructions.—Bills and Notes.—Non est Factum.—Burden of Proof.—An instruction, in an action upon a note where the defense was *non est factum*, that the plaintiff must prove by a preponderance of the evidence all of the material allega-

tions of his complaint and defendants must likewise prove the allegations of their answer is erroneous, the burden of proof on the question of the execution of such note being upon the plaintiff.

From Hancock Circuit Court; *Thomas J. Cofer*, Special Judge.

Action by William Higgins as administrator of the estate of Michael Higgins, deceased, against Amos D. McCormick and another. From a judgment for plaintiff, defendants appeal. *Reversed.*

T. S. Adams and *J. L. Clark*, for appellants.

Brill & Harvey and *Otis E. Gulley*, for appellee.

ROBY, C. J.—Suit on a promissory note. Answer, *non est factum* in terms as follows: “Amos D. McCormick, defendant in the above cause, being first duly sworn, upon his oath says, for his separate answer herein, that he did not sign or execute the note in suit, and that he did not authorize any other person to sign or execute the same for him. Wherefore, he demands judgment for costs.” Trial by jury. The court gave an instruction in terms as follows: “It is incumbent upon the plaintiff to prove, by a fair preponderance of the evidence, all the material allegations of his complaint, and it is incumbent upon the defendants to prove, by a fair preponderance of the evidence, the allegations of their answer.”

The verified answer of *non est factum* puts in issue the execution of the instrument sued on, and it then devolves upon the plaintiff to prove the execution. *Evans v. Southern Turnpike Co.* (1862), 18 Ind. 101; *Young v. Baker* (1902), 29 Ind. App. 130; *Cunningham v. Hoff* (1889), 118 Ind. 263; *Carver v. Carver* (1884), 97 Ind. 497. The instruction was therefore erroneous. No other question argued is likely to arise subsequently.

Judgment reversed, with instructions to sustain the motion for new trial.

NICHOLS & SHEPARD COMPANY v. BERNING ET AL.

[No. 5,529. Filed January 11, 1906.]

1. **APPEAL AND ERROR.**—*Appellate Court Rules.*—*Briefs.*—Where appellant sets out in his brief a questioned second paragraph of answer and then the opening and closing statements of a questioned cross-complaint with the statement that the body thereof is the same as the answer set out, the Appellate Court rule, requiring appellant to set out in terms or substance the pleadings questioned, is sufficiently complied with. p. 113.
2. **PLEADING.**—*Complaint.*—*Exhibits.*—*References to, in Answer.*—*Sufficiency.*—Where the complaint sets out the contract sued on as an exhibit, it is not necessary to set out same in the answer or cross-complaint, an inclusion thereof by reference being sufficient. p. 113.
3. **REFORMATION OF INSTRUMENTS.**—*Demand.*—*Cross-Complaint.*—Where plaintiff has brought an action on an alleged contract with defendant, it is not necessary for defendant to make a demand for reformation before asking for same in a cross-complaint. p. 114.
4. **CONTRACTS.**—*Execution.*—*Negligence.*—*Fraud.*—*Reformation.*—Where defendant, a German, unable to read or write the English language, orally agreed with plaintiff's agents upon the limits of his liability, but plaintiff's agents, one of whom was defendant's cousin in whom defendant placed reliance to see that the contract as written expressed the agreed terms, wrote the contract essentially different, thus making defendant liable without limitations, and defendant executed same thinking, and being assured, by such agents, that the written contract embodied the oral terms, he is not guilty of negligence, no outside parties being involved. p. 114.
5. **PLEADING.**—*Cross-Complaint.*—*Negating.*—*Acceptance of Order.*—Where plaintiff's complaint on a contract does not allege that an acceptance of defendant's order for goods was sent to and received by defendant, it is not necessary for defendant in his cross-complaint for reformation to negative the receipt of such acceptance of his order. p. 116.
6. **SAME.**—*Cross-Complaint.*—*Reformation.*—*Indefiniteness.*—*Motion to Make Specific.*—Where a cross-complaint for reformation does not definitely set out the mistake complained of, a motion to make specific, and not a demurrer for want of facts, is the proper remedy. p. 116.

7. **APPEAL AND ERROR.**—*Weighing Evidence.*—The Appellate Court will not disturb a decision of the trial court resting on conflicting oral evidence. p. 116.
8. **EVIDENCE.**—*Contracts.*—*Oral Negotiations.*—In an action on a written contract wherein defendant, by a cross-complaint, seeks a reformation thereof, evidence of the oral negotiations leading up to the execution of such written contract is admissible, not to contradict such written contract, but to show what the contract really was. p. 117.
9. **PRINCIPAL AND AGENT.**—*Delegation of Authority.*—*Assistants.*—Where plaintiff's agent employed another person to assist in making a sale and the sale so made was accepted by such agent and afterwards ratified by the plaintiff, the question of delegation of authority to such assistant is superfluous. p. 118.
10. **JUDGMENT.**—*Motion to Modify.*—Where the finding is general and the judgment follows in accordance therewith, a motion to modify same, setting out as grounds therefor the insufficiency of the evidence to support same and the insufficiency of the cross-complaint as a basis for relief, is properly overruled. p. 118.

From Allen Circuit Court; *E. O'Rourke*, Judge.

Action by the Nichols & Shepard Company against Henry Berning and another. From a judgment for defendant Berning on his cross-complaint, plaintiff appeals. *Affirmed.*

Breen & Morris, for appellant.

W. G. Colerick, K. C. Larwill and *Guy Colerick*, for appellees.

ROBINSON, J.—Action by appellant for damages for an alleged breach of a contract for the purchase by appellees of certain personal property. Appellee Springer was defaulted and judgment rendered against him. Appellee Berning answered in two paragraphs and filed a cross-complaint. A trial resulted in a judgment in Berning's favor on his cross-complaint. The sufficiency of the second paragraph of answer and the cross-complaint, and overruling the motions to modify the judgment and for a new trial are presented for review.

The contract, for breach of which the action is brought,

consists of a written order executed by appellees directing appellant to ship to appellees certain machinery which was to be paid for in a manner specified, and the subsequent acceptance of the order by appellant.

The second paragraph of appellee Berning's answer is in substance the same as his cross-complaint upon which the judgment in his favor is based. In the cross-complaint it is averred in substance that "prior to the making of the written agreement set forth in the complaint in said action, and to which reference is hereby made as a part hereof," appellee Berning, at the solicitation of appellee Springer, agreed to become his surety on one of the three notes mentioned in the agreement, the same being the first to mature, and refused to become in any manner involved in the purchase of the machinery or to create any liability in such purchase except to the extent above stated, and so advised Springer, who consented thereto, which fact was communicated to appellant's agents who prepared the agreement and who were about to sell the machinery to Springer; that the agreement was prepared by one of appellant's agents, who prior thereto and at the time was advised and notified by another agent, who had sold the machinery to appellee Springer and had made with him the oral agreement relative to such sale, that appellee Berning had merely agreed to become surety on the first note, and, when such statement was so made, the agent preparing the agreement suspended the preparation of the same momentarily for the purpose of inducing Berning to become surety on the last of the three notes instead of the first, but he refused so to do, and again asserted that he would only become liable on account of the sale of the machinery to Springer to the extent of the amount of the first note, and to which the agent so preparing the agreement said "All right," or words to that effect, and then completed the agreement; and after it was completed Springer signed it, and thereupon Berning signed it, supposing and believing at the time

that by and under its provisions his liability had been so limited; that he was not interested in the purchase of the machinery, and for that reason was not interested in the agreement, and gave no attention to the reading of the same, if it was read prior to the signing of his name; that, if he had known that by the agreement it was intended to extend his liability beyond the sum so limited, he would not have signed the same; that Berning is a German, and was and is unable to write or read the English language, and is barely able to write his name in English; that by and through the fraud, inadvertence or mistake of the scrivener who prepared the agreement he failed and neglected to insert therein a provision limiting Berning's liability to the note which he was to have executed; that the agent who made the oral agreement with appellee Springer for the sale of the machinery was Berning's cousin, in whom Berning reposed trust and confidence, which fact the agent then well knew, and believed that he would not permit cross-complainant to be wronged in the execution of the agreement, especially as such agent, who was present when the agreement was prepared and executed, knew of Berning's inability to read or write the English language, and that Berning depended and relied on him so to protect him; that he has always been and is ready and willing to execute the note, but none has been presented to him, and he is informed that appellee Springer will not receive the machinery; that "by reason of the facts above set forth he says that said agreement, so prepared by said agent and signed by this cross-complainant, being the agreement set forth in the complaint in this action, as written, is not his agreement, and that he did not execute the same as written, and that the same should be modified so as to conform with his oral agreement as above set forth, by inserting therein a provision limiting his liability to that of surety on the first of said three notes maturing."

Appellees' counsel insist that the sufficiency of the cross-complaint is not presented, because of appellant's failure, in the brief, to recite the material and essential

1. averments of the cross-complaint. The brief sets out very fully the second paragraph of Berning's answer. It also contains a copy of the opening statement of the cross-complaint, says that the averments of the cross-complaint following this opening statement are identical with the allegations of the second paragraph of answer, and then gives the concluding averments of the cross-complaint. This is a sufficient compliance with the rule. To say that the averments of a pleading are identical with those contained in another pleading is the statement of a fact, not a conclusion. If the averments of one pleading are identical with those of another, the averments of the two pleadings are exactly the same.

It is provided by statute (§365 Burns 1901, §362 R. S. 1881) that when any pleading is founded on a written instrument the original or a copy must be filed with

2. the pleading, and the rule is well settled that the failure to file such exhibit renders the pleading bad against a demurrer. But it is also well settled that if a defense or cross-action arises out of the instrument sued upon, a copy of which is already before the court, it is unnecessary to file with the answer or cross-complaint a copy of the instrument, but is sufficient to refer to the exhibit already on file. *Frankel v. Michigan Mut. Life Ins. Co.* (1902), 158 Ind. 304; *Wadkins v. Hill* (1886), 106 Ind. 543; *Grubbs v. Morris* (1885), 103 Ind. 166; *Gardner v. Fisher* (1882), 87 Ind. 369; *Sidener v. Davis* (1879), 69 Ind. 336; *Pattison v. Vaughan* (1872), 40 Ind. 253; *Germania Fire Ins. Co. v. Dechard* (1892), 3 Ind. App. 361. The cross-complaint makes a sufficient reference to the agreement set forth in the complaint to make it a part of the cross-complaint. The agreement consisted of two parts—the proposition of the purchaser to buy, and its

subsequent acceptance by the seller. It took both to make the contract, and while the cross-complaint uses language in certain parts to indicate that the pleader had in mind the written proposition only, yet, when the pleading is taken as a whole, it may be said that it fairly shows that the agreement or contract set out in the complaint is made a part of the cross-complaint by reference.

Appellee Berning was not required to demand a reformation of the agreement before filing the cross-complaint. If

Berning were the moving party, and the only

3. relief sought was the reformation of the written agreement, a previous demand would be essential, but even in that case no prior demand would be necessary, if, in addition to the reformation, a recovery was demanded. *Earl v. Van Natta* (1902), 29 Ind. App. 532; *Lucas v. Labertue* (1882), 88 Ind. 277; *Axtel v. Chase* (1882), 83 Ind. 546; *Sparta School Tp. v. Mendell* (1894), 138 Ind. 188; *Walls v. State, ex rel.* (1895), 140 Ind. 16; *Citizens Nat. Bank v. Judy* (1896), 146 Ind. 322. However, he was brought into court by appellant to litigate the matters in controversy, and was under no obligation to make any demand except by his pleadings in court. *Harshman v. Mitchell* (1889), 117 Ind. 312; *Stitz v. Sadler* (1887), 109 Ind. 254.

It is further argued against the cross-complaint that the pleading shows appellee Berning is not entitled to relief because of his negligence in not having the contract

4. read over to him or in not paying attention to it while being read. The reformation asked is because of mistake or fraud. The rights alone of the parties to the alleged contract are involved in this action. The rights of third persons are in noway involved. The pleading shows that Berning was unable to write or read the English language, which fact was known to one of appellant's agents who was present at the time the agreement was made, and who was a cousin of appellee Berning, and in

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whom he reposed trust and confidence, which the agent knew, and that Berning believed such agent would not permit him to be wronged in the execution of the agreement especially as the agent knew of Berning's inability to read or write the English language. It is further shown that appellee Berning was not interested in the purchase of the machinery, and for that reason was not interested in the agreement, and gave no attention to the reading of the same, if it was read prior to the signing thereof; that he had stated to what extent only he would become liable, and that he believed at the time that under the provisions of the agreement his liability had been so limited; and that by and through the fraud, inadvertence or mistake of the scrivener who prepared the agreement, who was an agent of appellant, he failed to insert therein a provision limiting the liability of appellee Berning to the note which he was to have executed.

The agreement had not been previously prepared, but was prepared at the time and in the presence of appellee Berning, and during its preparation facts are averred to show that the limitation of his liability was agreed upon, and that then the preparation of the agreement was completed. The person who was writing the agreement was one of the contracting parties. He was directed at the time by appellee Berning to limit Berning's liability on account of the sale of the machinery to appellee Springer to the extent of the amount of the first note, and agreed to do so, and then completed the preparation of the agreement, but omitted so to limit appellee Berning's liability. Under such circumstances we can see no sufficient reason to hold that Berning was negligent in not having the agreement read to him after the agent completed its preparation.

It was not necessary that appellee Berning should negative the receipt by him of appellant's written acceptance

of his order, from which he would have learned

5. that appellant regarded him as a joint purchaser with appellee Springer. There are no facts averred in the pleadings from which it must necessarily be presumed that a written acceptance of the order was sent to and received by appellee Berning.

It is further argued that the mistake in the contract is not clearly and definitely pointed out. This objection to the sufficiency of the pleading as against the de-

6. murrer is not tenable. If the pleading is defective in this respect the defect would be reached by a motion to make more specific, and not by demurrer. We have already set out the material averments of the cross-complaint. It shows the oral agreement of the parties, that the written agreement was to correspond with this oral agreement, that the agreement as written is not appellee Berning's agreement, that he did not execute the agreement as written, and then states the modification desired. There was no error in overruling the demurrer to the cross-complaint.

Counsel have discussed at some length the sufficiency of the evidence to sustain the finding in Berning's favor. But there is evidence to authorize the conclusion

7. reached. It is unnecessary to set out the evidence upon the matters about which there was a dispute, as we can not disturb the conclusion reached without weighing the evidence, and this we can not do. Nearly all the evidence introduced was oral. The following language of the Supreme Court in *Hudelson v. Hudelson* (1905), 164 Ind. 694, is applicable, and is controlling here: "If we were to attempt to perform the task which appellants' counsel ask us to undertake in pursuance of the provisions of the act of 1903, we would in reality perform the identical duty which the trial court discharged in passing upon the motion for a new trial. We can not weigh and deter-

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mine the preponderance of conflicting oral evidence, for often-stated and obvious reasons. * * * The decision of the trial court upon the motion for a new trial will be disturbed only when the evidence upon the controlling issue is documentary, by deposition, or otherwise of such a clear and conclusive character as to enable and to warrant this court to say, as a matter of law, that such decision is erroneous." See *Parkison v. Thompson* (1905), 164 Ind. 609; *United States, etc., Paper Co. v. Moore* (1905), 35 Ind. App. 684. See, also, *Ray v. Baker* (1905), 165 Ind. 74.

Evidence was properly admitted to show the negotiations between the parties leading to the execution of the contract, not for the purpose necessarily of contra-

8. dicting the written contract, but for the purpose of showing in fact what was the contract, which, through mistake or fraud, was not reduced to writing. If the agent, in preparing the alleged written agreement, purposely omitted some of its terms which the parties at the time agreed it should contain, and such omission was not known to appellee Berning, such act of the agent was a fraud upon Berning. If the contract as reduced to writing does not, through mutual mistake or fraud, correctly express the agreement of the parties, it is not the contract of the parties. The agent knew appellee Berning was relying upon him to put their agreement in writing, and there is evidence that all the parties present representing appellant knew what the agreement was and the extent to which Berning was to become liable. Reformation of the written agreement is sought upon the ground that it omits a provision the parties agreed upon. There is evidence that it was agreed that this agreement should contain a provision limiting the liability of Berning to the extent of the amount of the first of the notes to be given for the purchase price of the property. Appellee Berning

does not deny that he made a contract, but he is asking that the written instrument be reformed so as to express the contract that he made. A careful consideration of all the evidence leads to the conclusion that there is evidence authorizing the trial court to grant him the relief asked. See *Citizens Nat. Bank v. Judy*, *supra*; *Givan v. Master-son* (1899) 152 Ind. 127; *Keller v. Equitable Fire Ins. Co.* (1867), 28 Ind. 170; *Earl v. Van Natta*, *supra*; *Prescott v. Hixon* (1899), 22 Ind. App. 139, 72 Am. St. 291; *Morris v. Stern* (1881), 80 Ind. 227.

The evidence shows that one Parham was appellant's agent, and that he employed Westenfeld to assist him in making a sale of the machinery. Westenfeld pre-

9. pared the contract as it was written, and which appellee Berning signed. It is argued that the evidence fails to show that Parham was authorized to delegate his authority to others. If Parham employed Westenfeld to do certain acts in making a sale of the machinery, and such acts were within the scope of Parham's agency, and Parham accepted and acted upon them as done, there was no delegation of authority as agent, but the acts of Westenfeld became the acts of Parham the same as if done by Parham himself. However, it is unnecessary to inquire into the authority of Parham in this respect, for the reason that appellant afterward undertook to perform this alleged contract by offering to deliver the machinery so sold by virtue of the contract. The act done by Parham through Westenfeld was ratified by appellant.

The court rendered judgment against appellee Springer for \$173.05, and decreed that the contract be reformed, that Berning signed the contract for the purpose

10. of becoming surety on the first of three notes only, as the appellant well knew, which notes were to be executed as part of the purchase price of the article sold to Springer, and that Berning recover costs. Appellant

moved to modify the judgment by striking out that portion reforming the contract and giving Berning a judgment for costs, and substituting in lieu thereof a judgment in favor of appellant against Berning for \$173.05 on the following grounds: (1) Because the judgment in favor of Berning is contrary to the evidence; (2) the judgment is not sustained by sufficient evidence; (3) that such judgment is not sustained by sufficient evidence, whereas upon the evidence the plaintiff is entitled to a judgment in its favor against Berning for \$173.05; (4) because Berning's cross-complaint does not state facts sufficient to constitute a cause of action against appellant in his favor and to warrant the judgment rendered in his behalf.

There was a general finding, and the judgment follows the finding in every respect. The motion to modify does not ask to correct in any way the form or substance of the judgment by eliminating any part of it, or in any way correcting it, but is based upon grounds that go to the sufficiency of the evidence to give appellee Berning any judgment, and the sufficiency of Berning's cross-complaint to give him any relief. If the judgment is wrong, it is because the finding of the court is wrong. Upon the finding the judgment is right both in form and substance. As the motion to modify does not state any grounds upon which to base a modification, it was properly overruled.

Some questions reserved upon the admission of evidence have not been argued by counsel, but an examination of these questions does not disclose any reversible error against appellant. From the whole record it appears that the case was fairly tried, and a correct conclusion was reached upon the merits.

Judgment affirmed.

STATE, EX REL. ACKERMAN, AUDITOR, v. KARR ET AL.

[No. 5,536. Filed January 11, 1906.]

1. PLEADING.—*Demurrer for Want of Facts.*—*Raises Question of Plaintiff's Authority to Maintain Suit.*—A demurrer for want of sufficient facts raises the question of plaintiff's authority to maintain an action for the cause stated. p. 122.
2. SAME.—*Complaint.*—*Drains.*—*Contracts.*—*Bonds.*—*Suits on, by Auditor as Relator.*—*Trusts.*—*Statutes.*—Where a contractor for a public drain refuses to perform his contract for the construction thereof, and the county auditor relets the contract for such construction to another contractor, paying a greater sum therefor, the county auditor is not a proper relator to bring an action on the bond of such original contractor for such damages, since he has no personal interest therein and is not the trustee of an express trust under §252 Burns 1901, §252 R. S. 1881. p. 122.
3. ACTION.—*Parties.*—*Drains.*—*Contractor's Bonds.*—*Statutes.*—Under §253 Burns 1901, §253 R. S. 1881, all actions on bonds payable to the State shall be brought on the relation of the parties interested, and this applies in favor of the assessed landowners as against a drainage contractor's bond. p. 124.

From White Circuit Court; *Truman F. Palmer*, Judge.

Action by the State of Indiana, on the relation of Jasper L. Ackerman as county auditor of White county, against James P. Karr and another. From a judgment for defendants, plaintiff appeals. *Affirmed.*

William E. Uhl, for appellant.

Reynolds, Sills & Reynolds and *George F. Palmer*, for appellees.

MYERS, J.—This is an action instituted by appellant on the bond of appellee James P. Karr, to recover damages for a breach of a contract for the construction of a ditch in White county, Indiana, under and pursuant to the act of 1881 (Acts 1881, p. 410) and amendments thereto. §§5656-5675 Burns 1901.

From the complaint it appears that various steps were taken before the Board of Commissioners of the County of

White, under and pursuant to said act, for the establishment and construction of a certain public ditch, whereby on April 8, 1901, appellee Karr, being the lowest and best bidder for the construction of certain parcels of such ditch, the same was awarded to him, and he then and there entered into a contract with Jasper L. Ackerman, as auditor of said county, for the construction thereof. At the same time, and for the purpose of securing a full performance of such contract, he executed a bond payable to the State, in a sum double the amount of the contract price for such work, with Abram Sluyter as surety thereon, which bond was duly approved by said auditor, and is still in full force and effect. Said Karr has failed and refused to carry out his part of the contract, and to construct the ditch as therein provided. Relator by reason of such refusal was compelled to, and did thereafter, relet said contract to another at a cost or price of \$1,000 more than the sum for which appellee Karr, by his said contract, agreed to do said work. Such subsequent contract was made at the lowest price for which relator could obtain such work to be done. Neither of the contracts aforesaid was for a contract price in excess of the estimated cost of such work, as reported by the viewers and reviewers of such ditch. By reason of appellee Karr's failure to perform said work, and carry out his said contract as therein provided, relator says he was and is damaged in the sum of \$1,000. He is prosecuting this suit for the benefit of the landowners whose lands have been assessed for the construction of said ditch. Judgment for \$1,000 is demanded. Appellees demurred to the complaint on the grounds: (1) That relator has no legal capacity to sue, (2) that there is a defect of parties plaintiff, and (3) that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was sustained by the trial court, and, relator refusing to plead further, judgment was rendered on demurrer.

The ruling of the court in sustaining appellees' demurrer is here assigned as error.

A demurrer to a complaint for want of facts has been held to be sufficient to challenge the authority of the plaintiff to maintain a suit upon the cause of action.

1. *Farris v. Jones* (1887), 112 Ind. 498, 503, and cases cited. In view of this authority the question of the right of appellant to maintain this action is presented for our consideration.

As we understand the averments of the complaint, the contract and bond were executed pursuant to and as authorized by §5656, *supra*. This section of our statute,

2. among other things, provides that "the party receiving such contract, shall contract in writing with the auditor and give bond, with surety to be approved by the auditor, providing for the compliance with and performance of said contract." The bond in suit is payable to the State of Indiana, and conditioned that said Karr will construct the ditch and complete said work, as provided in the contract, and upon failure will pay all damages and costs accruing by reason of such failure. The contract was not complied with. In fact, it appears that no attempt was made to comply with it, and, by reason of such failure, that part of the ditch included in the contract with Karr was relet or subsequently contracted to another person at an increased cost and expense, which, under §5674, *supra*, was by the auditor placed upon the tax duplicate against the lands assessed for the payment of such work. From the averments of the complaint it appears that in the regular course of events, and pursuant to law, the lands assessed for such work have been and are liable to an increased assessment over that for which they would have been liable had appellee Karr performed his said contract with such auditor. It does not appear that the State or county has been in any way damaged or injured by Karr's failure to carry out his contract, nor is it claimed that any of the

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extra cost or expense made on account of such failure is a proper charge against any fund or against any of the revenues belonging to the State or county. There is no provision in the drainage law, under which this ditch was sought to be constructed, expressly authorizing relator to institute this suit, nor does it attempt to provide the procedure under a state of facts such as we have before us.

It is not claimed that relator's authority to prosecute this action is found in the drainage act, but is authorized by §252 Burns 1901, §252 R. S. 1881. By this section "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

Under the law it was the duty of the obligor upon entering into a contract with the auditor for the construction of the ditch to give bond with surety to the approval of such auditor, providing for a compliance with his contract. The approval of the bond rests with the auditor, and there his authority ends in that regard. The bond was given and approved as required by law. The obligation therein is one of indemnity. It is a protection to those who suffer damages and costs by reason of the contractor's noncompliance with the contract. It is clear under the facts that the revenues of the State or county have not and will not by Karr's failure be affected, for by the very act itself it is made the duty of the auditor to place upon the tax duplicate, against the property assessed, all costs and expenses of the sale and resale of that part of the ditch covered by the contract. The entire additional burden is made to rest upon the landowner. He is thereby damaged. He is the party injured and interested. The bond in suit was an instrument required by the law for such improve-

ment. It is an obligation authorized by law, and from which the law, acting upon the relationship of the parties, establishes the privity and creates the liability under the bond to the parties damaged by a breach of the contract, and for all such damages such parties may be reimbursed by an action on such bond.

We are unable to agree with appellant that the auditor, whose authority in this particular is purely statutory, can be considered as a trustee of an express trust by reason of the fact that as such official he was a party to the contract. While it is true that "the contract and bond are to be considered together" (*Brown v. Markland* [1899], 22 Ind. App. 652), yet the bond is the foundation of this action (*King v. Downey* [1900], 24 Ind. App. 262). But under §253 Burns 1901, §253 R. S. 1881, it is expressly

3. provided that "actions upon official bonds, and bonds payable to the State, shall be brought in the name of the State of Indiana, upon the relation of the party interested," and as we are unable to trace any interest in the controversy to the relator, we can not conclude in the face of the section of our code last cited that relator, by the simple act of approving the bond, thereby became authorized under §252 *supra*, to maintain this action. In our opinion §§251, 253 Burns 1901, §§251, 253 R. S. 1881, control, and the facts here appearing do not bring the relator within the provisions of these sections.

Judgment affirmed.

LEDBETTER v. COGGESHALL ET AL.

[No. 5,677. Filed January 12, 1906.]

APPEAL AND ERROR.—*Appellate Court Rules.*—*Briefs.*—Where appellant's brief merely sets out the pages and lines of the transcript where the questioned complaint may be found without setting out such complaint in terms or substance, such appeal will be dismissed for failure to comply with Appellate Court rule twenty-two. Robinson, J., concurs but votes for a modification of such rule.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Henry B. Ledbetter against Alvarez Coggeshall and another. From a judgment for defendants, plaintiff appeals. *Appeal dismissed.*

Davis & Davis, for appellant.

Custer & Cline, for appellees.

BLACK, P. J.—The only supposed error assigned is the action of the court in sustaining a demurrer to the complaint.

The appellee has directed attention to the appellant's failure to comply with the requirement of rule twenty-two of this court, that the appellant's brief shall contain a concise statement of so much of the record as fully presents the error relied on, in that the brief does not show the contents or the substance of the complaint to which the demurrer was addressed, the brief merely referring to the place in the transcript where, it is said, the complaint is set forth. This is not a sufficient compliance with the rule. *Schreiber v. Worm* (1904), 164 Ind. 1; *Tuthill Spring Co. v. Holliday* (1904), 164 Ind. 13; *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435.

The appellant's brief being insufficient to require our consideration of any assignment of error, the appeal should not be entertained.

Appeal dismissed.

ROBINSON, J.—This appeal must be dismissed, unless there is a modification of rule twenty-two, but I believe that rule should be modified.

ROSE v. OWEN.

[No. 5,992. Filed January 12, 1906.]

APPEAL AND ERROR.—*Vacation Appeal.*—*Service of Notice on Appellee's Attorney.*—*Sufficiency.*—Notice of a vacation appeal served upon appellee's attorney of record is sufficient unless appellant has received notice, prior to such service of notice, that such attorney has been discharged by appellee.

From White Circuit Court; *John H. Gould*, Judge.

Action by Hiram E. Rose against William D. Owen. From a judgment for defendant plaintiff appeals. Motion by appellant for an order for publication. *Motion denied.*

Reynolds, Sills & Reynolds, George H. Custer and *W. H. Latta*, for appellant.

McConnell, Jenkins & Stuart, for appellee.

ROBINSON, J.—Appellant's verified motion asks an order to publish notice to appellee of the pendency of this appeal. The motion states that at the trial appellee was represented by attorneys; that since the trial appellee has removed to parts unknown to appellant, and that whether he has acquired a residence in any place other than Cass county appellant is unable to state; that the attorneys who represented appellee in the trial court have been served with notice of the appeal. Facts are also set out in the motion tending to show that the attorneys representing appellee in the trial court may have been discharged, and that appellee may deny the authority of such attorneys to receive notice, and for these reasons it is asked that publication be ordered.

The record shows that judgment was rendered December 22, 1904. On December 13, 1905, appellant served notice in writing on the clerk below, and on the attorney of record for appellee in that court, that appellant appealed from the judgment to the Supreme Court. The transcript was filed in that court December 19, 1905. As the record shows that there has been a substantial compliance with the requirements of §652 Burns 1901, §640 R. S. 1881, concerning notice of an appeal after term, there is no necessity for an order for publication as provided by §663 Burns 1901, §651 R. S. 1881. Service by publication is ordered only in cases where it is made to appear that the appellee is a nonresident, and that notice of the appeal can not be served upon the attorney of record in the court below. The

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attorney who appeared of record in the court below, so far as notice under §652, *supra*, is concerned, is presumed to continue as such attorney until the party proposing to appeal has notice of the termination of the relation of attorney and client. Even though appellee may have discharged his attorney after the rendition of the judgment and before the appeal, the service of notice upon the attorney is as good as upon appellee himself, in the absence of a showing that appellant had notice of such discharge. *Richardson v. Pate* (1884), 93 Ind. 423, 429, 47 Am. Rep. 374. The notice of the appeal was served by the sheriff by reading the same to the attorney of record without any denial upon the attorney's part that he was authorized to receive the notice, nor is any showing whatever made that at the time the notice of the appeal was served upon the attorney of record in the trial court the relation of attorney and client between him and appellee had ceased to exist. See *Shaefer v. Nelson* (1897), 17 Ind. App. 489; *Dougherty v. Brown* (1898), 21 Ind. App. 115; *Tate v. Hamlin* (1895), 149 Ind. 94.

Order denied.

TOWNSEND ET AL. v. MENELEY.

[No. 5,302. Filed May 11, 1905. Rehearing denied November 28, 1905. Transfer denied January 12, 1906.]

1. DESCENT AND DISTRIBUTION.—*Illegitimate Children.—Common Law.*—At the common law an illegitimate child was not an heir of its deceased father. p. 129.
2. SAME.—*Illegitimate Children.—Statutes.*—Under §2630 Burns 1901, §2475 R. S. 1881, Acts 1853, p. 78, §1, an illegitimate child could inherit from its father only where such father left no legal heirs within the United States, nor legitimate children without the United States. p. 129.
3. SAME.—*Illegitimate Children.—Statutes.—Repeal.*—The act of 1901 (Acts 1901, p. 288, §2630a Burns 1901), providing that illegitimate children shall be heirs of their fathers under cer-

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tain circumstances, repeals the act of 1853 (Acts 1853, p. 78, §1, §2630 Burns 1901, §2475 R. S. 1881) upon the same subject. p. 130.

4. WORDS AND PHRASES.—*"Acknowledge."*—The word "acknowledge" means to admit, to own, to confess or to recognize a truth or fact. p. 131.
5. STATUTES.—*Construction.—Meaning of Words.*—In the construction of a statute words are to be given their ordinary meaning unless that would defeat the manifest intent. p. 132.
6. DESCENT AND DISTRIBUTION.—*Illegitimate Children.—Burden of Proof.*—The burden of proof to establish that plaintiff is the illegitimate child of her father and that he acknowledged her to be his child, is upon plaintiff. p. 132.
7. SAME.—*Illegitimate Children.—Acknowledgment.—Evidence.*—Where decedent told respective witnesses that the plaintiff, an illegitimate child, "was dead sure mine;" "was his'n;" "was the only child he had;" "she [plaintiff's mother] had had a child and it was his'n," acknowledgment of paternity is sufficiently shown, there being no contradictory evidence. p. 132.
8. SAME.—*Heirs.—When Persons Become.*—A person becomes an heir at the death of the ancestor, and not before. p. 134.
9. STATUTES.—*Remedial.—Construction.—Descent and Distribution.—Illegitimate Children.*—Statutes providing that under certain circumstances illegitimate children shall be heirs of their fathers are remedial and should be liberally construed. p. 134.
10. SAME.—*Retroactive.—Descent and Distribution.—Illegitimate Children.*—Under §2630a Burns 1901, Acts 1901, p. 288, an illegitimate child, acknowledged by the intestate ancestor to be his, such ancestor leaving no legitimate children or descendants thereof, inherits such ancestor's estate, although such ancestor's acknowledgment of such child occurred before the taking effect of such statute, and not afterwards. pp. 134, 138.

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Suit by Dora Meneley against William Townsend and another. From a decree for plaintiff, defendants appeal. *Affirmed.*

Brill & Harvey and *McBride, Denny & Denny*, for appellants.

Isaac A. Love, W. R. Jewell, Jr. and James L. Clark, for appellee.

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WILEY, J.—This was a suit for the partition of real estate, in which appellee was plaintiff. While the complaint is in three paragraphs, the facts upon which the rights of the parties depend are briefly stated in the second. It is there alleged that Marion Townsend died intestate, seized in fee simple of an undivided two-thirds interest in the real estate in controversy; that he never married; that he died without lawful issue or the descendants of lawful issue; that he left the appellee surviving, she being his issue by Keziah Kenworthy, born out of wedlock; that the intestate during his lifetime acknowledged appellee as his own child; that he left surviving him appellants, who were his brothers; that appellant Charles owned the undivided one-third of said real estate, and that no person or persons had any right, title or interest therein except appellee and appellant Charles. Appellant William was made a party, as disclosed by the other paragraphs, because he, in connection with Charles, was in possession, etc. The issues were joined by an answer in denial. Trial by court, resulting in a finding for appellee and a decree ordering partition.

Appellant's motion for a new trial was overruled, and such ruling is the only error assigned. While the motion alleged several reasons why a new trial should be granted, the only one argued is that the decision is not sustained by sufficient evidence.

The question for decision involves the right of an illegitimate child to inherit from its putative father under our statute, for, if it can inherit, it must be by

1. virtue of a statutory right, for at common law that right was denied.

The first legislation in this State upon the subject in hand was in 1853 (Acts 1853, p. 78), and section one of the statute then enacted is as follows: "The real

2. and personal estate of any man dying intestate, without heirs resident in any of the United States

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at the time of his death, or legitimate children capable of inheriting without the United States, shall descend to and be invested in his illegitimate child or children who are residents of this State or any of the United States; and such illegitimate child or children shall be deemed and taken to be the heir or heirs of such intestate in the same manner, and entitled to take by descent or distribution to the same effect and extent as if such child or children had been legitimate: Provided, that the intestate shall have acknowledged such child or children as his own during his lifetime; and provided, further, that the testimony of the mother of such child or children shall in no case be sufficient to establish the fact of such acknowledgment.” §2630 Burns 1901, §2475 R. S. 1881. Under this statute the brothers and sisters of the intestate, who died without lawful issue, inherited his estate in preference to an illegitimate child, if he left one. *Bourroughs v. Adams* (1881), 78 Ind. 160.

It will be observed both from the statute and the case cited that if an intestate left an illegitimate child or children, and also brothers and sisters, the latter took the estate, and the former were left remediless. This being true, the legislature undertook the duty of caring for the interests of illegitimate children, who at common law were fatherless, and had no right to inheritance. They were mere outcasts, and it was an act of humanity, quickened by good conscience and advancing civilization, for the legislature to remove, so far as possible, the blight and curse of their illegitimacy, and clothe them with the rights of inheritance under such conditions as it might impose.

And so in 1901 (Acts 1901, p. 288 §1, §2630a Burns 1901) the legislature passed the following statute: “That the illegitimate child or children of any man dying

3. intestate and having acknowledged such child or children during his lifetime as his own, shall inherit his estate, both real and personal, and shall be deemed and taken to be the heir or heirs of such intestate in the

same manner and to the same extent as if such child or children had been legitimate: Provided, that the testimony of the mother of such child or children shall in no case be received to establish the fact of such acknowledgment; and be it further provided that the provisions of this act shall not apply where the father of the illegitimate child, at his death, had surviving legitimate children or descendants of legitimate children." By section two of that act "all laws and parts of laws in conflict with the provisions of this act" were expressly repealed. We have no doubt, therefore, that the act of 1901, *supra*, repealed the act of 1853, *supra*, and that the rights of the parties must be determined by the latter act as applied to the facts established by the evidence.

There is no controversy about the following facts: Marion Townsend was never married. No legitimate issue of his body survive him. He died the owner of the real estate in controversy. Appellants were in possession thereof. They denied appellee's rights therein. Appellee was the illegitimate child of the intestate.

There are two points of contention which will be considered in their order: (1) Does the evidence establish the fact that Marion Townsend "during his lifetime" acknowledged appellee "as his own" child? Appellee assumes that the evidence does establish this fact, while the contrary is earnestly contended for by appellants. It should be remembered that the language of the statute is "that the illegitimate child or children of any man dying intestate and having acknowledged such child or children during his lifetime as his own, shall inherit," etc.

The words "acknowledge" or "acknowledged" have no fixed legal meaning. They are not given or defined in the law dictionaries. We must therefore look to their

4. common or ordinary meaning, for that is the sense in which the legislature used the word "acknowledged." "Acknowledge" means "to own or admit the

knowledge of; to recognize as a fact or truth; * * * to own or recognize in a particular character or relationship." Webster's Dict. As the Psalmist said: "I acknowledge my transgressions." Solomon (Prov. 3:6) said: "In all thy ways acknowledge Him." Thus a man acknowledges a secret marriage; that is, he admits it. One who has done wrong may acknowledge his fault, and thus confess his error.

Words used in a statute are to be given their ordinary meaning, unless that would defeat the manifest legislative intent. *City of Evansville v. Summers* (1886), 108

5. Ind. 189; *Bishop v. State, ex rel.* (1898), 149

Ind. 223, 39 L. R. A. 278, 63 Am. St. 279. The statute does not fix any method or standard by which a putative father may acknowledge his illegitimate offspring, but has left the fact of such acknowledgment to be established by evidence in each particular case, as any other fact is established. In some of the states the legislature has defined what shall constitute acknowledgment by the father of his illegitimate child. Thus, in South Dakota, it must be in writing signed by the father in the presence of competent witnesses. In Iowa, such "recognition must have been general and notorious, or else in writing." The Kansas statute contains the same provision.

As to the issue of appellee's having been acknowledged by the intestate as his own child, the burden was upon her, and before she would be entitled to inherit under

6. the statute it was incumbent upon her to show an acknowledgment that was clear and unambiguous, and such as would exclude all but one interpretation. 3 Am. and Eng. Ency. Law (2d ed.), 897.

The evidence clearly establishes the fact that Marion Townsend "acknowledged" appellee as his child, within the meaning of the word as used in the statute.

7. To one person who testified in the case, in speaking of Miss Kenworthy, the mother of appellee, to

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whom he referred as "the kid," the intestate said: "It was dead sure mine." The same witness testified: "We asked him whose kid it was [referring to appellee], and he said 'his'n.'" One witness who lived in the same town where appellee lived, testified that he met the intestate in Indianapolis, who asked him how Dora (meaning appellee) was; that witness answered that she was all right, and that he replied that that was the only child he had. Another witness testified as follows: "Did you ever have any other conversation about this child [referring to Miss Kenworthy's child]? A. Oh! I don't recall any special conversation. Now what was said about the child? State as fully as you can. A. Well, I can't; simply the child was his own. What child was his? A. Well he said this Keziah Kenworthy he had ruined, she had had a child and it was his'n. That is what he said exactly." There was other evidence of the same character, and no showing made to the contrary. It is fair to say that when the statute of 1901 went into effect Marion Townsend was an inmate of a private sanatorium; that he was of unsound mind, and died in that condition. All the evidence going to establish the fact of his acknowledgment of appellee as his child referred to times antedating May 15, 1901, when the statute went into force.

Having reached the conclusion that the evidence establishes the fact that Marion Townsend acknowledged appellee "during his lifetime as his own child," within the meaning and intent of the statute, we come to the consideration of the only remaining question about which there is any contention, viz.: (2) Can appellee inherit under the provisions of the statute, where it appears that the only acknowledgement by the intestate that his illegitimate offspring was his own child antedated the time when the statute went into effect? The statute under consideration has never been before the courts of appeal for construction, and hence the question presented is one of first impression

in this jurisdiction. When the statute was enacted and went into effect both appellee and her putative father were in being. They came within the class defined by the act. The legislature declared that an illegitimate child, its father having acknowledged it as his own during his lifetime, would be entitled to inherit his estate. The only material difference between the act of 1853, *supra*, and that of 1901, *supra*, is that the words "without heirs" in the former were omitted from the latter, thus showing the manifest intent of the legislature to give a preference to an illegitimate child over other heirs, except as to legitimate children. The statute says that such illegitimate child or children "shall be deemed and taken to be the heir or heirs of such intestate," etc.

The inquiry here suggests itself: When is a child an heir? The supreme court of South Dakota has answered that inquiry in the following language: "Mani-

8. festly, upon the death of its ancestor, an heir, as the term is here used, is always appointed by the law. Its title is called into existence by the death of its ancestor, and its rights are governed by the law in force at the time of such death." *Moen v. Moen* (1902), 16 S. Dak. 210, 92 N. W. 13. In the case just cited the court had under consideration a statute similar to the one now before us, and we may have occasion again to refer to it.

Statutes of this character are remedial, and should be liberally construed so as to carry out the manifest intention of the legislature. Black, *Interp. of Laws*, p.

9. 311; *Brower v. Bowers* (1850), 1 Abb. App. Dec. 214; *Beall v. Beall* (1850), 8 Ga. 210; *Swanson v. Swanson* (1852), 2 Swan (Tenn.) 445.

Without specially considering the question as to whether this statute is retroactive or wholly retrospective, we are content to rest the question upon the reasoning of

10. the supreme court of Iowa, as expressed in the case of *Alston v. Alston* (1901), 114 Iowa 29, 86 N. W.

55. In that case the court had under consideration the Iowa statute to which reference has been made. To entitle an illegitimate child to inherit from its putative father under the Iowa statute, he had to show that the father recognized him as his own child during his lifetime, as the statute declared that such recognition must be open and notorious, or in writing, etc. The acts and words of recognition antedated the passage of the statute, and in discussing the statute as applied to the proved facts, the court said: "Appellees insist that the evidence of recognition must be strictly limited to acts and conversations subsequent to the time when such recognition would by law entitle the plaintiff, if an illegitimate son, to inherit. For this contention they cite the case of *Hartinger v. Ferring* [1885], 24 Fed. 15, in which the circuit court of the United States for the northern district of Iowa reached the conclusion contended for; but we think this position is untenable. The legislature having the right to determine the rules of inheritance in accordance with which the property of persons subsequently dying shall be distributed, may provide as it sees fit with reference to who shall be heirs. There is no vested right to inherit until the death of the ancestor. It may therefore be provided that illegitimate children already born and recognized shall be considered heirs. The recognition contemplated by the statute is not recognition as prospective heir, but recognition as an illegitimate child; and whoever fulfils the conditions of the statute as to the right to inherit, existing at the time of the death of the ancestor, is entitled to inherit under the statute. There is nothing in the language indicating that it was to be applicable to such recognition as should afterwards be made. It describes a class of persons, and declares that persons of that description shall inherit; it does not refer to or create a status. It is prospective in its operations as to the right, but there is nothing to suggest that persons of the class described—that

is, illegitimates already recognized—shall not inherit under it. It would be just as reasonable to limit the provisions of the statute to illegitimates afterwards begotten and born as to so limit it to illegitimates afterwards recognized, and it would be just as reasonable in the one case as in the other to argue that to adopt a construction making it applicable to existing illegitimate children would be to give the statute a retrospective effect. But it is not contended by appellees that the statute is to be limited to illegitimates subsequently begotten and born.”

Counsel for appellants, to support the proposition that appellee can not inherit under our statute, because, if her putative father ever acknowledged her, it was before the statute became effective, cite, among others, the following cases: *Brown v. Belmarde* (1864), 3 Kan. 41, 53. *Stevenson v. Sullivant* (1820), 5 Wheat. *207, 5 L. Ed. 70. In *Alston v. Alston*, *supra*, the court disposes of the above-cited cases as follows: “The cases of *Brown v. Belmarde* [1864], 3 Kan. 41, and *Stevenson v. Sullivant* [1820], 5 Wheat. *207, 5 L. Ed. 70, as well as the case of *Rice v. Efford* [1808], 3 H. & M. (Va.) 225, on which the latter of these two cases is based, all relate to inheritance by illegitimates under a statute passed after the death of the ancestor, and whatever language may have been used apparently supporting the decision in *Hartinger v. Ferring* [1885], 24 Fed. 15, must be regarded as pure dictum.”

It is but fair to say that the case of *Hartinger v. Ferring*, *supra*, was decided by Judge Shiras as one of the judges of the eighth federal circuit, and the case turned upon the construction of the Iowa statute, just as in the case of *Alston v. Alston*, *supra*, and he held the recognition required by the putative father must have occurred after the passage of the act. The decision in *Hartinger v. Ferring*, *supra*, was rendered in June, 1885, before the supreme court of Iowa had construed the statute. The general rule is that the construction put upon a statute

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of a state by the courts of that state will be accepted and followed by the courts of the United States. *McKeen v. Delancy* (1809), 5 Cranch *22, 3 L. Ed. 25; *Bucher v. Cheshire R. Co.* (1888), 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Dundee Mortgage, etc., Co. v. Parrish* (1885), 24 Fed. 197. *Alston v. Alston, supra*, was decided in 1901, and if, prior to the decision of the case of *Hartinger v. Ferring, supra*, the supreme court of Iowa had construed the statute as it did in the *Alston* case, we have no doubt but that the federal court would have followed it. The *Alston* case is so directly in point, and the reasoning so sound, that we accept and adopt it as the law.

Moen v. Moen (1902), 16 S. Dak. 210, 92 N. W. 13, follows the rule declared in *Alston v. Alston, supra*. In the *Moen* case the court said: "No one has any vested rights in his ancestor's property until the latter's death. He may not survive the ancestor. The ancestor may dispose of the property by will, or the law of succession may be changed before his title becomes vested. * * * Has the paternity of the person claiming to be an heir been acknowledged by the deceased? * * * The time and place of such acknowledgment are not prescribed by the statute. It may have been made at any place and at any time after the birth of the claimant and before the death of the ancestor. * * * There is, therefore, no merit in the contention that the acknowledgment in this case is ineffectual because it was executed before the statute took effect." These authorities are in harmony with the spirit of the statute which they interpret and construe, and appeal to us as declaring a just principle of law as applied to our own statute.

Appellee having established, by competent evidence, that her putative father "acknowledged" her "during his lifetime as his own" child, although such acknowledgment was before the statute took effect, our conclusion is that the statute makes her his heir, and confers upon her the

right to inherit his estate, to the exclusion of appellants, who are his brothers.

Judgment affirmed.

ON PETITION FOR REHEARING.

ROBY, J.—The petition for a rehearing is based upon the contention that the acknowledgment contemplated by the act of 1901 (Acts 1901, p. 288, §1, §2630a 10. Burns 1901), was an acknowledgment made after the taking effect of said act. The argument supporting the proposition is, briefly, that the father ought to be held to have spoken in the light of the law as it was, and that an acknowledgment ought not to be given a new meaning and effect which he could not at the time have contemplated. The fault with this argument is that it treats the acknowledgment as having to do only with the right of inheritance. The father may be impelled to such acknowledgment by many other than property considerations, promptings of natural affections, emotions of repentance, of pity, a desire to be just and to repair his previous delinquencies, may, any or all of them, furnish an adequate reason for making an acknowledgment of the truth. It is not an acknowledgment of the right of the child to inherit property that is provided for by statute. It simply specifies what shall be evidence to prove the relation of parent and child under certain circumstances. The effect of such evidence is to make the child a member of a class for which provision as to inheritance is made by the legislature. The members of this class are as clearly entitled to inherit under statutes subsequently passed for their benefit, as the legitimate children, prior to the passage of an act relative to the inheritance of property by them, would be entitled to its benefits. It would be illogical in either case to hold that only children born after the legislative enactment could derive benefit therefrom.

Petition for rehearing overruled.

BAGGERLY ET AL. v. LEE, TRUSTEE.

[No. 5,522. Filed March 30, 1905. Rehearing denied October 24, 1905. Transfer denied January 12, 1906.]

1. SCHOOLS AND SCHOOL DISTRICTS.—*Township Trustees's Control over Property.—Statutes.*—Under §8068 Burns 1901, §5993 R. S. 1881, the township trustee has the control and supervision of the school property of his township. p. 142.
2. SAME.—*Schoolhouses.—When Occupied "for Common School Purposes."*—A schoolhouse is occupied "for common school purposes" under §5999 Burns 1901, §4510 R. S. 1881, from the beginning of the school term to its end, including nights, Saturdays and Sundays. p. 142.
3. INJUNCTION.—*Use of Schoolhouses.—Township Trustees.*—Injunction may be maintained by the township trustee to prevent a religious organization from using a schoolhouse on Saturdays, Sundays and nights during the term of a public school though such organization was given permission by such trustee under §5999 Burns 1901, §4510 R. S. 1881, to use such house "when unoccupied for common school purposes." p. 144.
4. APPEAL AND ERROR.—*Sustaining Demurrer to Paragraph of Answer.—Facts Admissible under Another.*—It is harmless error to sustain a demurrer to a paragraph of answer whose facts are admissible under the general denial already filed. p. 146.

From Perry Circuit Court; C. W. Cook, Judge.

Suit by John H. Lee as township trustee of Tobin School Township against James M. Baggerly and another. From a decree for plaintiff, defendants appeal. *Affirmed.*

John W. Ewing and Sol. H. Esarey, for appellants.

William M. Waldschmidt and William A. Land, for appellee.

WILEY, J.—This was a suit in equity to enjoin appellants from using a public schoolhouse for religious purposes. The complaint was in one paragraph, to which a demurrer was addressed and overruled. Appellants answered in two paragraphs, and subsequently filed a supplemental second paragraph. To the second and supple-

mental paragraph of answer a demurrer was filed and sustained. The issue therefore was joined by the first paragraph, which is a general denial. Upon the trial of the cause the court found for the appellee, and entered a decree perpetually enjoining appellants from using the school-house for religious purposes. Appellant's motion for a new trial was overruled, but is not assigned as error.

Appellants rely for a reversal upon the overruling of their demurrer to the complaint, and sustaining appellee's demurrer to their second paragraph of answer and their second paragraph of supplemental answer.

The complaint is very brief, and, omitting the formal parts, is as follows: "Plaintiff, for cause of action herein, says that plaintiff is the duly elected, qualified and acting trustee of Tobin school township, Perry county, Indiana; that defendants are connected with, and the managers of, a religious congregation known as the 'Church of the Latter-Day Saints,' in said township; that defendants have petitioned the plaintiff to permit them to use for church purposes a public school building in school district number one in said township during the part of the year in which there is no school—that is, from the time the school term adjourns in the spring until the succeeding term convenes in the fall—and plaintiff has granted said request, but plaintiff has expressly forbidden defendants, or any one else, from entering into and using said school building for church or other religious purposes during any of the time when the school term to be taught in said building is in session—that is, from the time the school begins in the fall until it finally adjourns in the spring of the year—and denies defendants' right to do so; that, over and in defiance to the protest of the plaintiff and against his protest, defendants, together with the other members of said congregation, are entering into and holding religious meetings in said public school building, which is known as the Cum-

tings school building, on evenings and on Sundays, and at other times during said school term while school in said public school building is not convened, and defendants are inducing others to enter said school building during said school term, and defendants are threatening to, and will unless restrained, continue so to use said building during said school term; that said use of said school building is detrimental to the success and management of said school. Wherefore plaintiff prays that an order be granted restraining defendants, with their congregation, from so entering into said building for the purpose of holding said meetings at all times during the year from the time the school in said township begins in the fall of the year until it ends in the spring, and for all other relief."

Do the facts pleaded entitle appellee to injunctive relief? It is shown, and so admitted by the demurrer, that appellants were using and threatening to continue to use and would so use the school building for religious purposes, unless restrained. Primarily, public school buildings are erected, equipped and maintained out of public funds for the education of the youth of the state. Such funds are raised by a system of taxation provided by the legislature. There is no inherent right in any citizen or in any religious or political organization to use public school buildings for any other purposes than those devoted to the public schools.

Appellants recognize the fact that they have no inherent right to use the schoolhouse in question for religious purposes, but base their right thereto upon an act of the legislature passed in 1859 (Acts 1859, p. 181), section six of that act (§5999 Burns 1901) being as follows: "If a majority of the legal voters of any school district desire the use of the schoolhouse of such district for other purposes than common schools, when unoccupied for common school purposes, the trustee shall, upon such application, authorize the director of such school district to permit the people of

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such district to use the house for any such purpose, giving equal rights and privileges to all religious denominations and political parties without any regard whatever to the numerical strength of any religious denomination or political party of such district.”

We have no doubt of the right of a township trustee to exercise control of and supervision over the school property in his township, for that right is conferred upon

1. him by the express provision of subdivision five of §8068 Burns 1901, §5993 R. S. 1881. This right was recognized in the case of *Hurd v. Walters* (1874), 48 Ind. 148, and has never been questioned.

This action was prosecuted by the township trustee, who *ex officio* is school trustee of the school township, to protect and preserve the interests of the public in the school

2. property. As §5999, *supra*, grants the right to use a public school building for other purposes than common schools, when such schoolhouse is “unoccupied for common school purposes,” upon the petition of a majority of the legal voters of the school district, appellants contend that they were entitled to such use. Their right thereto depends upon what was meant by the legislature in the expression used in the statute “when unoccupied for common school purposes.” The statute provides that all schools in a township shall be taught an equal length of time, as nearly as same can be done, and that the duration of a school term in each school township shall not be less than six months. §§5920a, 5981 Burns 1901, Acts 1899, p. 424, §2, §4494 R. S. 1881. We know, as a matter of common knowledge, and from the history of the State, that the annual school terms commence in the autumn of each year and are continuous until the end of the term. In a legal and technical sense, any public school building in which a public school is being conducted is, in the language of the statute, “occupied for common school purposes” from

the beginning to the ending of the term. It is the duty of the school officers to provide all necessary fuel and other equipments for the convenience of the school. We know, from common observation and knowledge, that during the school term the pupils many times leave their books, papers, pencils, etc., on or in their desks, and all the appliances and school furniture are left unprotected. If a schoolhouse can be opened during the school term to religious organizations, political parties, or other societies or organizations for public meetings, where all classes of citizens would have a right to attend, it would almost necessarily follow that to some extent, at least, the interests of the school would be jeopardized. A schoolhouse is occupied for "school purposes" from the time a school term opens until it closes, including school days, Saturdays, Sundays and nights, in the same sense that a dwelling-house is "occupied" by a family as a domicile, even though all members of the family are temporarily absent over night or during the day, or even for a longer period. A temporary absence of the members of a family from their domicile does not vacate the premises. A dwelling-house is only vacant when it ceases to be used as a place of human habitation or for living purposes. The word "occupation," as applied to a dwelling-house, means living in it, and hence to become vacated or unoccupied it must be without an occupant, without any person living in it. *Home Ins. Co. v. Boyd* (1898), 19 Ind. App. 173; *Paine v. Agricultural Ins. Co.* (1875), 5 Thomp. & C. (N. Y.), 619; *American Ins. Co. v. Padfield* (1875), 78 Ill. 169.

For these reasons our conclusion is that at the time of the commencement of this action, as is shown by the complaint, the schoolhouse in question was occupied "for common school purposes;" and even though the appellants, together with a majority of the legal voters of the school district, had petitioned the trustee to grant them the privilege of using

the schoolhouse for religious purposes on Sundays or at night, he had no authority to grant such petition, even under the section of the statute quoted, for it is there provided that he is only authorized to grant such petition when the schoolhouse was "unoccupied for common school purposes."

The complaint shows that, upon petition, appellee, as trustee, granted to appellants the privilege of using the schoolhouse in which to hold religious services during the time intervening between the close of the school term in the spring and the commencement of the succeeding school term in the fall. During that period, if the statute is a valid one—and upon this question we do not express any opinion—the trustee might properly grant such privilege. In this connection, without comment, we desire to call attention to an expression in §4, article 1, of the state Constitution, as follows: "No man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent."

It is further shown in the complaint that during the period of the school term the appellee, as trustee, expressly forbade the defendants, or any one else, "from entering into and using said school building for church or other religious purpose;" but that, in defiance of the appellee's protest, appellants, together with other persons, had continued to enter into said schoolhouse and hold religious services therein on Sundays and on evenings, and they threatened to and will continue to use the same. As the appellee, as trustee, is charged with the care, management and control of the school property in his school township, we have no doubt of his right to protect the interests of the school and the public by an application to the court to restrain appellants from so using the schoolhouse. There was no error in overruling the demurrer to the complaint.

This brings us to the consideration of the ruling of the court in sustaining a demurrer to the second paragraph and the "supplemental second paragraph" of the answer. The substance of the second paragraph is that prior to appellants' using the school building for religious purposes, they, with other legal voters of the district, presented to the trustee a petition which was signed by all the legal voters therein, asking for the use of said building "when unoccupied for school purposes," and that the appellee thereupon granted such permission, and authorized them to use said schoolhouse for religious purposes "when unoccupied for school purposes;" that, in pursuance to the order of the trustee, appellants, with other patrons of said school district, entered said building for religious purposes on Sundays, and occasionally on Friday and Saturday nights; that they had attended such religious meetings at such schoolhouse on Sundays, and occasionally on Friday and Saturday nights, for a period extending back for several years, without any objection on the part of the trustee of said township; and that they are in no way connected with the management of the religious organization known as the "Latter-Day Saints," but merely attendants upon the religious meetings of that organization.

The facts set up in the supplemental second paragraph of answer are identical with those stated in the original second paragraph, except that it is averred that since the commencement of this action a majority of the legal voters of the school district petitioned appellee, in writing, that they be permitted to use said school building for religious purposes "when unoccupied for school purposes," and that appellee granted said petition.

For the reasons stated in discussing the sufficiency of the complaint, neither of these paragraphs of answer states facts sufficient to constitute a defense, for it affirmatively appears that appellants entered into and occupied the school

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building for religious purposes at times when it was occupied "for school purposes."

But there is another reason why there was no error in sustaining the demurrer to these paragraphs of

4. answer, and that is that all the facts stated and relied upon therein were admissible under a gen-

eral denial.

Judgment affirmed.

Comstock, C. J., concurs in the conclusion.

WAYNE INTERNATIONAL BUILDING & LOAN ASSOCIATION v. GILMORE ET AL.

[No. 4,984. Filed November 1, 1904. Rehearing denied January 12, 1905. Transfer denied January 12, 1906.]

BUILDING AND LOAN ASSOCIATIONS.—Mortgages.—Misrepresentations.—Fraud.—Opinions.—Where defendant executed his bond and mortgage to a building and loan association, and received a certificate of stock therefrom, which bond, mortgage and certificate obligated defendant to make 60 payments on such stock according to the by-laws, and such by-laws provided that as soon as such payments and the profits thereon were sufficient to make such stock worth par such stock would cancel such loan, the fact that plaintiff's agent represented, and defendant relied thereon, that such 60 payments would mature such stock and cancel said loan, constitutes no defense, being a mere opinion upon which defendant had no right to rely. *Hartman v. International Bldg., etc., Assn.*, 28 Ind. App. 65, distinguished.

From Superior Court of Madison County; *H. C. Ryan*, Judge.

Suit by the Wayne International Building & Loan Association against Charles I. Gilmore and others. From a decree for defendants, plaintiff appeals. *Reversed*.

A. R. Feemster and *D. W. Howe*, for appellant.

Walker & Foster, for appellees.

ROBINSON, J.—Suit by appellant to foreclose a mortgage given to secure a bond executed by appellee Gilmore. The

complaint avers that appellant issued to Gilmore a certificate of stock for five shares in class A of appellant association; that afterwards Gilmore borrowed from appellant \$500, and executed a bond for that sum, and a mortgage to secure the same; that, after making a certain number of payments, Gilmore refused to make further payments, leaving a balance still due and unpaid. The certificate of stock, the bond, mortgage and by-laws of appellant are made parts of the complaint. The certificate of stock certifies that appellee Gilmore is a shareholder in appellant association, and holds five shares of the par value of \$100 each, and that in consideration of the membership fee, together with the statements and agreements in the application for membership and stock, and of a full compliance with the charter and by-laws of appellant, which are referred to and made part of the contract, and the payment of \$1, not later than the 25th day of each month, on each share named in the contract, for sixty months, unless the stock should sooner mature, appellant promises to pay to the holder the sum of \$100 for each share named therein, whenever the monthly payments made in pursuance of the contract, and an equitable proportion of the profits shall amount to the par value of the stock. The bond contains the provision that whereas Gilmore has subscribed for five shares of stock of the face value of \$100 each, for which he received the sum of \$500 as a loan, which shares of stock are thereby transferred as collateral security for the payment of the bond, he agrees, on his part, that he will continue to pay monthly dues on the stock at the rate of \$1 per month on each share as provided by the by-laws of appellant, together with a premium of fifty cents per month on each share, and interest at six per cent per annum, all to be due and payable on the 1st and delinquent on the 25th day of each month, until such shares mature as provided by the by-laws of appellant. The mortgage contains the provision, that it is executed and intended as

security for the performance of the stipulations and agreements of the bond, conditioned that appellee Gilmore shall continue to pay monthly dues upon five shares of the capital stock at the rate of \$1 per month on each share of stock as provided in the by-laws, together with a premium of fifty cents per month on each share, and interest on the loan at six per cent per annum, due and payable on the 1st and delinquent after the 25th day of each month until the shares mature as provided by the by-laws of appellant. The by-laws of appellant provide, among other things, that the instalment stock of appellant is issued in three classes. Classes A, B and C shall be paid for in monthly instalments of \$1, eighty cents and forty cents, respectively, and the stockholders' liability for such instalments shall be limited to sixty, seventy-two and one hundred eight instalments, respectively; also that stock issued in classes A, B and C shall mature as soon as the total loan-fund portion of the monthly instalments, with accumulated profits, shall equal \$100 per share.

Appellee Gilmore in his fourth paragraph of answer admits the issuance to him of the five shares of stock, and that afterwards he borrowed the sum of \$500 thereon, executing the bond described in the complaint, and also executing to the appellant the mortgage described and set out in the complaint, and that the by-laws of appellant are referred to and made a part of the certificate of stock issued to him, and in both the bond and mortgage the by-laws are referred to, and in the bond and mortgage it is provided that payments shall be made until the shares mature as provided by the by-laws of appellant. He alleges that at the time of and before the issuance of the stock he was desirous of making a loan of \$500, and at that time he had no knowledge of the rules governing loan associations or the rights of persons becoming members thereof, and that for the purpose of inducing him to become a member, and to execute the bond and mortgage sued on, appellant, its offi-

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cers and agents, falsely and fraudulently represented to him that if he would become a member and shareholder, and subscribe for five shares of stock of the face value of \$100 each, and pay \$1 per share monthly in advance for sixty months, appellant would pay him the sum of \$500, and that if he would execute the bond and mortgage now in suit, and pay in addition thereto the premium of fifty cents per month on each share of stock, and interest on the loan at six per cent per annum, the stock would be thereby matured, the debt would thereby be fully paid, the mortgage and bond would be canceled, and he would be relieved from any further liability thereon; that he would be required to pay on the loan, for the maturity of his stock and the full payment of the loan, only sixty monthly payments, with premium and interest thereon; that appellant's agent exhibited to appellee a copy of the certificate of stock, wherein it is provided that the payment of \$1 not later than the 25th day of each month on each share for a period of sixty months, unless the stock shall sooner mature, shall constitute the total number of payments to be made on such stock, and wherein appellant promises to pay the holder \$100 for each share named therein whenever the monthly payments made in pursuance of the contract and the equitable apportionment of the profits shall amount to the par value of the stock; that appellant's agent also exhibited to appellee Gilmore a copy of the by-laws of appellant, containing the provisions hereinabove set out; that the language above set out as a part of the certificate was embodied in the certificate of stock issued to Gilmore, as averred in the complaint, and that the by-laws above mentioned were in force at the time the contract was entered into by Gilmore and the loan made; that appellant, by its agent, in explaining the language and meaning of the certificate of stock, and the by-laws above mentioned, and the bond and mortgage to be executed in the matter of the loan now in suit, represented and stated to appellee Gilmore that

such payments for such period would mature the stock, pay and satisfy the bond and mortgage, and discharge him from all liability thereon; that the proper and true meaning and construction of these sections of the by-laws and clause contained in the certificate was to the effect that Gilmore should pay sixty payments only, together with the interest and premium thereon in order to mature the stock and fully pay the bond and mortgage debt, and that such representations and explanations were so made for the purpose and with the intention of misleading and defrauding Gilmore by inducing him to purchase the stock and execute the obligation sued on in this action; that, at the time of such representations and explanations, appellant and its agents well knew that the same were false and fraudulent, and that they were made for the purpose of misleading appellee Gilmore and inducing him to become a member of appellant and make the loan; that, believing such representations and explanations so made to be true, and wholly relying on them, and having no other means of knowing the truth or falsity thereof, he took out the stock and executed the bond and mortgage. Appellee Gilmore further alleges that if he had not believed such false and fraudulent representations he would not have become a member, and would not have executed the bond and mortgage; that before the bringing of this action he had made payments for sixty months regularly each month, together with all dues and interest, and had paid appellant thereon the sum of \$600; that he made such payments, relying on the representations so made to him that the sixty payments would mature the stock and pay the bond and mortgage, and that he made all such payments in the full belief that they would fully mature the stock and pay and discharge the bond and mortgage, and all liability on account thereof; that at the end of sixty months, and after having made sixty payments of dues, with all premiums and interest thereon, and after having fully paid the debt according to the terms of the

contract, he demanded the cancelation and release of the bond and mortgage, and the return thereof, but appellant refused so to do, claiming that the stock was not matured, and the bond and mortgage were not yet fully paid; that appellee Gilmore then for the first time learned of the falsity of such statements and representations, and that thereby a fraud had been perpetrated upon him to become a member of appellant and take stock and execute the bond and mortgage.

The demurrer to this fourth paragraph of answer was overruled, and this ruling is assigned as error. The demurrer to this answer should have been sustained. Appellee Gilmore may have been induced to enter into the transaction by the representations made, but when he signed the bond and mortgage he agreed to comply with the stipulations therein contained. The bond and mortgage, and the by-laws made a part of each, state very plainly the manner in which the debt may be discharged. He obligated himself in the bond and mortgage to continue to make certain specified monthly payments "until such shares mature as provided in the by-laws," and the by-laws provide that the stock shall mature as soon as the total loan fund portion of the monthly instalments, with accumulated profits, shall equal \$100 per share. As a stockholder, he was to pay for sixty months only, but would receive the par value of his stock, as the certificate of stock says, whenever the monthly payments and an equitable apportionment of the profits should amount to the par value. This might have been some time after he had ceased making the monthly payments. As a borrower, he was not to pay for sixty months only, and have his debt canceled whenever the monthly payments and an equitable apportionment of the profits should amount to the par value; but he agreed, by the bond and mortgage, to continue to make these monthly payments until the shares should mature, and the shares would not mature, the by-laws say, until the total loan-fund portion

of the monthly instalments, with accumulated profits, should equal \$100 per share. Appellee Gilmore was a member of appellant association. He must not only take notice of its by-laws, but, in this case, the by-laws are expressly made a part of his contract. The bond and mortgage and the provisions of the by-laws are not susceptible of the construction given them by the representations made by the agent of appellant. It is not shown that Gilmore was in any way prevented from knowing all these provisions when he signed the bond and mortgage. There was no relation of trust or confidence between him and appellant's agent. See *American Ins. Co. v. McWhorter* (1881), 78 Ind. 136; *Miller v. Powers* (1889), 119 Ind. 79, 4 L. R. A. 483; *Robinson v. Glass* (1884), 94 Ind. 211. While the representations alleged in the answer might, if standing alone, be representations of facts, yet, as the by-laws provide that the stock shall not mature until the loan-fund portion of the monthly instalments, with accumulated profits, shall equal \$100, and as it is not possible to determine in advance what the future profits of the association will be, such representations, when taken in connection with the by-laws, were no more than the expression of the opinion held by the agent making them. See *Myers v. Alpena Loan, etc., Assn.* (1898), 117 Mich. 389, 75 N. W. 944; *Campbell v. Eastern Bldg., etc., Assn.* (1900), 98 Va. 729, 37 S. E. 350; *Winget v. Quincy Bldg., etc., Assn.* (1889), 128 Ill. 67, 21 N. E. 12; *Gale v. Southern, etc., Assn.* (1902), 117 Fed. 732; *O'Malley v. People's Bldg., etc., Assn.* (1895), 92 Hun 572, 36 N. Y. Supp. 1016; *Wayne, etc., Assn. v. Skelton* (1901), 27 Ind. App. 624; *Union Mut., etc., Assn. v. Aichele* (1901), 28 Ind. App. 69; *Noah v. German-American Bldg. Assn.* (1903), 31 Ind. App. 504.

Counsel for appellee Gilmore cite the case of *Hartman v. International Bldg., etc., Assn.* (1901), 28 Ind. App. 65, and state in their brief that upon the authority of that case the demurrer to this paragraph of answer was overruled.

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The answer in that case and the answer in the case at bar are substantially the same, but the complaints to which they are directed are very different. In the case of *Hartman v. International Bldg., etc., Assn., supra*, the only condition in the bond or mortgage as to the payments to be made or the maturity of the stock was that if the appellant should pay the appellee "the sum of a loan of \$800, this day to him made, on or before the maturity of the shares herein pledged as collateral security" and five per cent interest and five per cent premium, and seventy-five cents per share monthly as dues and perform the covenants of the mortgage, then the bond was to be void. In that case no reference is made to any by-law in either the bond or mortgage; in this case reference is made to the by-laws in both the bond and mortgage. In that case no by-laws were set out in any of the pleadings; in this case they are. In that case the bond and mortgage did not, in and of themselves, necessarily charge the borrower with the information that he was to pay a certain specified sum for an indefinite period of time; in this case the bond, mortgage and by-laws do necessarily charge appellee with the information that the loan was to be paid by monthly payments for a period of time necessarily uncertain in duration. In that case the representations made were not inconsistent with a reasonable construction of the only condition in the bond as to the payments to be made or the maturity of the stock; in this case the representations made were inconsistent with a reasonable construction of the conditions in the bond and mortgage and the provisions of the by-laws. In the opinion in that case reference is expressly made to the fact that no by-law is set out in the pleading, and no reference is made to any by-law in either the bond or the mortgage, and the opinion further states that "the bond and mortgage in the case at bar, so far as disclosed by the pleadings, stand alone, and their interpretation and meaning are not affected by any by-law, of the provisions of which a member must take

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notice." We still adhere to the ruling in that case, but the question presented in that case and the question in the case at bar are by no means the same.

The demurrer to the fourth paragraph of answer should have been sustained. Judgment reversed.

INDIANA ROLLING MILL COMPANY ET AL. v. GAS SUPPLY & MINING COMPANY.

[No. 5,271. Filed January 23, 1906.]

1. **APPEAL AND ERROR.—Pleadings.—Special Findings.—Same Questions Presented.**—Where the special findings show the same facts as stated in the pleadings, a decision on the special findings renders useless a decision on the pleadings. p. 155.
2. **LANDLORD AND TENANT.—Contracts.—Gas-and-Oil Leases.—Right to Determine.**—Where the landlord grants to his lessee, "its successors and assigns," the exclusive right to explore for gas and oil on his land, such lessee or assigns to drill a well within six months or thereafter furnish the landlord free gas until said well is drilled or the property reconveyed or the lease forfeited by its terms, and the assignee did not put down such well within the time but did furnish such free gas which was accepted, the landlord could not, without a demand and the giving to such assignee of a reasonable time thereafter to sink a well, arbitrarily refuse to take such free gas and terminate such contract. p. 158.
3. **TRIAL.—Venire de Novo.**—Where the special findings fully cover the facts in issue, a motion for a *venire de novo* should be overruled. p. 160.
4. **NEW TRIAL.—As of Right.—Injunction.—Quieting Title.—Statutes.**—A new trial as of right under §1076 Burns 1901, §1064 R. S. 1881, is not demandable in a suit for injunction where plaintiff also incidentally asks to have his title quieted. p. 160.

From Hancock Circuit Court; *Edward W. Felt*, Judge.

Suit by the Gas Supply & Mining Company against the Indiana Rolling Mill Company and another. From a decree for plaintiff, defendants appeal. *Affirmed.*

E. H. Bundy and Mason & Jackson, for appellants.
Forkner & Forkner, for appellee.

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WILEY, J.—Appellee was the successful party below, and obtained an order perpetually enjoining appellants from drilling a gas-well upon premises described in its complaint. Upon request the court made a special finding of facts and stated its conclusions of law thereon. Exceptions were reserved to the conclusions of law. Appellants' motions for a *venire de novo*, for a new trial for cause, and as of right, were overruled. All of these questions are presented by the assignment of errors.

Under these conditions of the record there is no necessity for referring to the pleadings, for the nature of the suit is fully exhibited by the special findings, and

1. upon such findings and the conclusions of law the ultimate rights of the parties may be determined.

We will only set out the facts found, which are material to determine the questions involved: August 22, 1898, Albert S. Palmer and wife were the owners and in possession of certain real estate. On that day they entered into a written contract with J. R. Bennett & Co., the material covenants and conditions of which were as follows: They granted to J. R. Bennett & Co., "its successors and assigns," for a term of one year, or so long as gas or oil may be found upon the premises, the exclusive right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water; to erect, maintain or remove all buildings, structures, pipe-lines and machinery necessary for the production and transportation of oil, gas, etc. The contract provided that the Palmers should have the right to use the premises for farming purposes, except such parts as might be actually occupied by J. R. Bennett & Co. A well was to be drilled within six months, or the company was to pay the Palmers "a rental of free gas for three fires and six lights until said well is drilled or the property hereby granted is reconveyed to first party, or this lease forfeited by its terms." The party of the second part (J. R. Bennett & Co.) was to furnish the first

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party (the Palmers) free gas, as above indicated, as long as the second party should use any gas-well under the terms of the contract. The first party was to lay and maintain necessary service-pipes from the well or pipe-line to their residence, and the second party was to make the connection. By the terms of the instrument the first party granted to the second party, etc., for a term of one year, or so long as gas and oil should be found, the right to enter upon said premises and explore for gas and oil, and the right to erect, maintain and remove buildings, pipe-lines, etc. The party of the second part, by such instrument, was granted the right to extend for three years the time for drilling the first well, or so long as the "grantors should use gas from said grantee's lines." In lieu of drilling a well within six months, the party of the second part had the right to pay a rental to the first party of free gas, etc., until said well should be drilled, etc. Said instrument was duly acknowledged and recorded. Shortly after the execution of the contract the second party laid a four-inch pipe-line along the west side of the land. Within sixty days the second party connected with its mains the service-pipes of the first party, and continued to furnish said first party free gas for domestic purposes, as provided in the contract, until said first party disconnected their service-pipes, and voluntarily ceased to use gas from the second party's lines, which they did on June 24, 1903. From the execution of the contract up to June 27, 1903, the first party was in the exclusive possession of the real estate, and neither the second party nor appellee have ever entered upon or had possession of said real estate, except to lay the gas-pipes, as above found. Neither the first party nor appellee has ever drilled any gas, oil or water wells upon said premises. Appellee company was organized for the purpose of drilling and operating gas and oil-wells, and selling its product to the public. The appellant Indiana Rolling Mill Company is a manufacturing company, using

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natural gas for fuel in the manufacture of its products, and for said purpose owns leases, and drills and operates gas-wells. The second party until shortly before parting with "their said lease," were willing to drill a gas-well upon said premises, and the first party until shortly before cutting off the gas, as above found, was satisfied with the arrangement by which the second party supplied gas for fuel, and by which the drilling of wells on the premises was deferred, and during such time the first party made no demand for the drilling of a well, nor made any complaint for a failure so to drill a well, "the compensation received under said lease, or any matter pertaining thereto." In the latter part of May or early part of June, 1903, Albert S. Palmer called upon the secretary and general manager of J. R. Bennett & Co. and orally notified him that the lease to J. R. Bennett & Co. had expired, and that he was contemplating leasing the farm to other parties, permitting them to drill for gas. On June 27, 1903, the Palmers executed to the Indiana Rolling Mill Company a written lease upon said real estate, granting to it the right to enter upon and drill for gas and oil thereon. Prior to the execution of said lease said company had actual knowledge of the existence of the lease of the Palmers to J. R. Bennett & Co., and of the terms and conditions thereof, and knew that the Palmers had received gas for domestic purposes until they voluntarily disconnected their service-pipes from J. R. Bennett & Co.'s mains. In the latter part of June, 1903, J. R. Bennett & Co. sold to appellee the lease first-above described, and on July 1, 1903, delivered the same to it, but no written assignment was made. By such sale and delivery appellee succeeded to all the rights and equities of J. R. Bennett & Co. "under said lease." Appellee paid a valuable consideration therefor and took possession thereof. A few days after the lease of the Palmers was delivered to the rolling mill company it erected a derrick and was proceeding to drill a well on

said premises, when it was temporarily restrained from proceeding further by an order issued in this cause.

As a conclusion of law the court stated that "the law is with the plaintiff, that the restraining order heretofore issued be made permanent, and the defendant rolling mill company enjoined from drilling upon the real estate," etc.

Under the contract and facts found but a single question is presented for decision. That question is this: By the terms of the contract and the facts found, had

2. the lease expired in the latter part of May or the early part of June, 1903? If it had, then J. R. Bennett & Co., or its assigns, had no further rights under it, and the Palmers had the right to enter into the contract with appellant rolling mill company. On the contrary, if it had not expired, nor had not been forfeited, the Palmers could not confer any rights to any one else to enter upon the premises and drill gas-wells thereon.

Under the original lease J. R. Bennett & Co. was granted the exclusive right "to enter upon the land at all times for the purpose of drilling and operating for oil and gas," and that right continued "for the term of one year, or so long as gas or oil is found upon the premises." It was bound to drill a well within six months, or in lieu thereof pay a rental of free gas, etc., "until said well is drilled, or the property hereby granted is reconveyed, * * * or this lease forfeited by its terms."

The contract does not lay upon J. R. Bennett & Co. the absolute duty of drilling a well within a fixed period, but gives it the option either to drill a well within that period, or to pay a rental of free gas for domestic purposes until said well is drilled. The contract was a continuing one, and, so long as J. R. Bennett & Co. performed the covenants required by the contract, the Palmers could not arbitrarily say that it had expired, or that it had been forfeited. It requires two or more parties to make a contract,

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and so long as one of the parties performs all the duties enjoined upon him the other party can not be relieved of his obligations.

We have no doubt but that the Palmers had a right to demand and have a well drilled, but so long as they accepted the rental agreed upon the contract was binding upon them, and they could not say that the contract had expired or that J. R. Bennett & Co. had forfeited its rights thereunder, until a demand had been made for drilling a well, and a reasonable time had elapsed after the demand in which to drill.

As was said in the very recent case of *New American Oil, etc., Co. v. Troyer* (1906), 166 Ind. 402: "There being no definite time limit within which the well must be constructed, the law intervenes and directs that it shall be accomplished within a reasonable time. This means within a reasonable time at the option of the landowner." The acceptance of the rental, which in this case was free gas, was a waiver of performance in developing the property during the time such gas was furnished and accepted. *Consumers Gas Trust Co. v. Worth* (1904), 163 Ind. 141; *Hancock v. Diamond Plate Glass Co.* (1904), 162 Ind. 146. The voluntary severance by the Palmers of their service-pipes from the mains of J. R. Bennett & Co. could not annul the latter's rights under the contract.

In *New American Oil, etc., Co. v. Troyer, supra*, the contract was in all essential respects similar to the one here. There, upon failure to drill a well within the specified time, the landowner agreed to accept an annual rental in money, while here, the rental agreed upon was to be free gas furnished the landowner until a well should be drilled. In that case the court said: "Under a contract of this sort parties must act fairly with each other. The landowner must be given a fair opportunity to compel such timely operations as will preserve the underlying oil and gas, and prevent its being mined through wells on other

premises. While, on the other hand, he will not be permitted to take advantage of delays that have been reasonably induced by his own conduct, and force a forfeiture for nonperformance. The operator must have a fair chance to perform his contract." See, also, *LaFayette Gas Co. v. Kelsay* (1905), 164 Ind. 563; *Indiana Nat. Gas, etc., Co. v. Beales* (1906), 166 Ind. 684; *New Amsterdam Oil, etc., Co. v. Wolff* (1906), 166 Ind. 704; *Consumers Gas Trust Co. v. Ink* (1904), 163 Ind. 174; *Consumers Gas Trust Co. v. Worth*, *supra*; *Consumers Gas Trust Co. v. Littler* (1904), 162 Ind. 320. These authorities, applied to the facts in this case, fully support the conclusion reached by the trial court. This disposes of the main point of contention.

Appellants insist that their motion for a *venire de novo* should have been sustained for the reasons (1) that the special findings are so defective, uncertain and
 3. ambiguous that no judgment could be rendered thereon; (2) that the findings contain the evidence and not the facts established by the evidence. We think the findings are not defective in failing to find the facts. Every issue tendered by the pleadings is fully covered. The motion was properly overruled.

Appellants further contend that they were entitled to a new trial, as of right, upon the theory that appellee, in its complaint, among other things asks that its title
 4. be quieted. While the complaint does ask for such relief, it is clear that the main purpose of the suit was to obtain injunctive relief, and this is the only relief given by the conclusion of law and decree. While the record and briefs refer to the contract as a lease, it is a misnomer so to designate it. It is a contract, by the terms of which the landowner gave to J. R. Bennett & Co., "its successors and assigns," the right, under certain conditions, to explore for gas and oil beneath the surface of the premises.

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In any event, the prayer here to quiet title is only an incident to the main relief sought, and in such case a party is not entitled to a new trial as of right, under the provisions of §1076 Burns 1901, §1064 R. S. 1881. *Nutter v. Hendricks* (1898), 150 Ind. 605; *Bradford v. School Town of Marion* (1886), 107 Ind. 280; *Thompson v. Kreisher* (1897), 148 Ind. 573; *Atkinson v. Williams* (1898), 151 Ind. 431.

Appellants were not entitled to a new trial as of right.

Appellants have not argued their motion for a new trial for cause.

We find no error, and the judgment is affirmed.

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[No. 5,509. Filed January 23, 1906.]

LANDLORD AND TENANT.—*Gas-and-Oil Leases.*—*Assignees.*—*Personal Liability.*—*Receivers.*—*Conveyances.*—Where a receiver of a corporation, with the written consent of all parties concerned, petitioned the court to permit such receiver to transfer to a new corporation all of the property and assets of the old on condition that such new corporation discharge certain liabilities against the old corporation and the receiver, which transfer was ordered made and the transfer confirmed, and a part of the assets was a gas-and-oil lease involving a liability for certain payments by the lessee or assignee, and such lease was afterwards assigned to defendants, they became personally liable for such payments, whether they took possession and complied with other conditions of such lease or not, their chain of title being perfect and such covenants running with the title.

From Superior Court of Madison County; *Henry C. Ryan*, Judge.

Action by Edward M. Pickard against Noel L. Robyn and another. From a judgment for plaintiff, defendants appeal. *Affirmed.*

Bartlett H. Campbell, for appellants.

Byron McMahan and *John C. Teegarden*, for appellee.

MYERS, J.—This is an action begun by appellee in the court below against appellants to enforce the payment of rent, for certain real estate, alleged to be due on account of a certain contract, or lease, entered into between appellee and appellants' remote assignor.

It appears from the complaint that on March 13, 1899, appellee was the owner of certain real estate in Madison county, Indiana, and on that date, in writing, his wife joining, granted to the Union Trust Company of Indianapolis, Indiana, as receiver of the Kelley Axe Manufacturing Company "all the gas and oil in and under" said certain described real estate, "together with the sole right to enter thereon at all times to drill and operate for gas and oil; to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of gas or oil" therefrom, except one-sixth part of all oil produced and saved from the premises, which is reserved by appellee. Said receiver also agreed to pay to appellee \$100 on January 1, 1900, \$150 on January 1, 1901, and thereafter \$200 on the 1st day of January, and \$100 annually in advance for each well operated by second party, so long as second party holds this lease. "First party shall have no power to determine this lease at any time whatever so long as second party does or is ready and willing to do the things herein required of it. If after second party has abandoned all wells drilled under this lease it fails to release the same of record, as above provided, it shall continue to pay first parties at the rate of \$200 annually until it does so release said lands." The complaint further avers that the receiver, in leasing the land, acted under the order of the court, and "in the month of April, 1900, by order of the Madison Circuit Court, said Union Trust Company of Indianapolis, Indiana, transferred and turned over to the Kelley Axe Manufacturing Company of Alexandria, Indiana, said contract, agreement and lease, as now shown by record in said court, in order-book No.

59, pages 443, 444, of the records of said court; that thereafter, on July 3, 1903, said Kelley Axe Manufacturing Company of Alexandria, Indiana, sold, transferred and assigned the same in writing to the defendant Noel L. Robyn;" that on July 9, 1903, appellant Robyn, in writing, transferred and assigned to appellant Joseph Clayton a one-eighth interest in said contract or lease. It is further averred that although appellants and their assignors, immediate and remote, have retained all rights under *such* lease to enter upon the premises and drill for gas and oil, ~~they~~ have not at any time done so, but have duly paid all ~~rentals~~ due on January 1, 1900, 1901, 1902 and 1903; that the payment due January 1, 1904, is past due and unpaid, and that upon demand appellants refused to pay the same, and judgment is demanded. Appellants' demurrer to the complaint was overruled. Thereupon they answered by general denial. The issue thus formed was submitted to the court for trial, resulting in a finding and judgment in favor of appellee in the sum of \$206.33.

Appellants appeal to this court, and assign as error the action of the court (1) in overruling the demurrer to the complaint; (2) in overruling the motion for a new trial. Two grounds are assigned in the motion for a new trial: (1) The decision of the court is contrary to law; (2) the decision of the court is not sustained by sufficient evidence.

It is conceded that the demurrer to the complaint and the motion for a new trial present one and the same question, viz: Is there an unbroken chain of transfers or assignments of the lease from the Union Trust Company to appellants? Appellants claim there is not, and that as possession of the real estate was never actually taken and wells sunk thereon they can not be held liable for a breach of the covenants of the lease.

When the receiver was appointed for the Kelley Axe Manufacturing Company of Kentucky, by operation of law, the custody and control of all of the company's prop-

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erty vested in the court. High, Receivers, §422. The Union Trust Company became an officer of the court, and the court's agent to carry out its orders. Tiedeman, Sales, §256. The complaint avers, and the evidence as taken from the records of the Superior Court of Madison county clearly shows, that the Union Trust Company, when it took the contract or lease from appellee, was acting under the direction of the court in the management of the property. On July 2, 1901, the Kelley Axe Manufacturing Company, by its petition to the court, represented that all the debts and liabilities of that company had been fully paid, except an indebtedness to the receiver; that a corporation under the laws of this State, known as the Kelley Axe Manufacturing Company of Alexandria, had been formed for the purpose of purchasing all of the assets of the old company, and that the latter corporation, subject to the order, consent and approval of the court, had sold and conveyed all of its assets to the Indiana corporation, which latter corporation had assumed and agreed to pay all the debts and demands arising out of the conduct and operation of the business by such receiver, and prayed that such sale so made be confirmed, and that the receiver be authorized to turn over to the Kelley Axe Manufacturing Company of Alexandria all the property, assets, rights and choses in action, in the hands of such receiver, belonging to the old company. It also appears from the evidence that the receiver and all parties interested joined in the petition and entered their written consent that all property in the custody of the court, by virtue of such receivership, be transferred to and confirmed in the new corporation, as in the petition prayed; the court thereupon approved and confirmed the sale, and entered an order directing the receiver to turn over to the Kelley Axe Manufacturing Company of Alexandria all the property of every nature—real, personal, etc.—in its possession as such receiver, and charging the new company with certain payments, and ordering

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the receiver to make a final report. Thereupon the receiver made and submitted to the court its final report in the premises, among other things, showing that it had placed the Kelley Axe Manufacturing Company of Alexandria in the possession of all the property heretofore in its possession as such receiver, which report was in all things approved and confirmed by the court, and the receiver discharged.

The lease in question was a part of the assets in the hands of the receiver undisposed of at the time the court entered its general order and direction to its officer to transfer the property then under its control to the Kelley Axe Manufacturing Company of Alexandria. The debts of the old corporation having all been paid, the property was still liable to be converted into money for the payment of the necessary expenses and debts of the receiver in executing the trust, after which the distribution would be to the several stockholders, as their interests might appear. Granting that by the terms of the lease it was a grant of an interest in the real estate (*Heller v. Dailey* [1902], 28 Ind. App. 555), yet such interest was within the control of the court, and subject to its orders. As a court of equity it had full power to make such orders relative thereto as would seem to be to the best interest of all concerned. By the petition of the old corporation it was made to appear that the receiver should be ordered to transfer all the property then in its hands to the new corporation. The receiver acquiesced in this representation, and the court, in the exercise of its powers, ordered the receiver to transfer the property to the new corporation upon the condition that it would make certain payments to the receiver, thereby saving to the trust any additional expense of the receivership, and the expenses attendant upon a conversion into money by such receiver, of the property then remaining, and the distribution thereof.

The action of the court in reality amounted to an order to the receiver (1) to sell the property then in its hands to the new corporation upon the terms proposed; (2) upon acceptance by the new corporation of the terms of the sale, and the execution of its direct primary obligation to pay all the debts charged upon the property in the receiver's hands, to make the transfer; (3) to make report to the court. In obedience to the court's order the receiver reported the sale and a compliance on the part of the vendee, and the sale was by the court confirmed.

The proceedings had in the Madison Circuit Court brought the specific matter, that of the lease, before the court. Its orders in the premises were judicial, and were sufficient to show an assignment of the lease to the Kelley Axe Manufacturing Company of Alexandria. Appellants contend that there is no assignment of the lease by the old corporation. This was not necessary, as the court was the vendor. *Mayhew v. West Virginia Oil, etc., Co.* (1885), 24 Fed. 205, 215. *Bland v. Bowie* (1875), 53 Ala. 152, 159.

For another reason appellants' contention is not well grounded. The Superior Court of Madison county had jurisdiction of the subject-matter and the parties. It made the order of transfer. Its officer, likewise its vendee, complied with that order. It confirmed the action of its agent. Its vendee and appellants have acted and relied upon this action of the court by executing and receiving assignments of the lease in question. There has been a breach of the conditions of the lease by a failure to pay rental. Appellants seek to escape liability solely by impeaching the order of the court. This they can not do. As said in *Sheldon v. Newton* (1854), 3 Ohio St. 494: "If the court had jurisdiction of the subject-matter, and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous, its proceedings may have been; its final order

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can not be regarded as a nullity, and can not, therefore, be collaterally impeached.”

We deem further comment unnecessary, as the record in this case authorizes an affirmance of the judgment of the trial court.

Judgment affirmed.

HAY ET AL. v. BASH.

[No. 5,516. Filed January 24, 1906.]

1. **APPEAL AND ERROR.**—*Appellate Court Rules.*—*Briefs.*—Where appellants set out the substance of the pleadings questioned there is a sufficient compliance with Appellate Court rule twenty-two. p. 169.
2. **PLEADING.**—*Demurrer to Complaint.*—*Form.*—A demurrer for the reason that the complaint “does not contain facts sufficient to constitute a good cause of action” is sufficient, being equivalent to the language of the statute. p. 169.
3. **SAME.**—*Complaint.*—*Theory.*—*Negligence.*—*Master and Servant.*—A complaint by a servant for damages on account of injuries received from the breaking of a fly-wheel in defendants’ sawmill is based upon the theory of negligence by the master in the use of dangerous machinery. p. 170.
4. **SAME.**—*Complaint.*—*Allegations.*—*Inferences.*—*Negligence.*—*Master and Servant.*—A complaint by the servant alleging that the master “carelessly and negligently run and operated said mill and machinery, well knowing that the same was unsafe and dangerous in this, to wit, * * * that the fly or balance wheel was an old, condemned, cracked and blemished wheel;” that plaintiff was ignorant thereof and that the master knew thereof, is insufficient, there being no direct allegation of such defect, and such complaint is not cured by an allegation that plaintiff was injured by the negligence of defendant in failing to provide “a safe, secure and sound fly or balance wheel.” p. 170.

From Kosciusko Circuit Court; *Edgar Haymond*, Judge.

Hay v. Bash—37 Ind. App. 167.

Action by Charles A. Bash against James Hay and another. From a judgment on a verdict for plaintiff for \$3,000, defendants appeal. *Reversed.*

Bertram Shane, for appellants.

Melvin H. Summy, Herschel Lehman and Wood & Bowser, for appellee.

ROBINSON, J.—Appellee recovered a judgment for damages for a personal injury. Overruling a demurrer to the complaint and the motions for a new trial and in arrest of judgment are assigned as errors.

The complaint avers, in substance, that appellants, under the firm name of Hay & Co., owned and operated a saw-mill and were engaged in the manufacture of lumber; that the mill was on February 16, 1900, operated and managed by one Walburn as agent of the firm; that in the mill was a large amount of machinery, consisting of engine, boiler, shafting, carriage, pulleys, wheels, belts, ladders and saws, all of which were used in operating the mill, in the operation of which a large force of men was employed, of which appellee was one; that it was appellee's duty, as an employe of appellants, to operate the machinery used in pulling logs into the mill and to do any and all other work about the mill he should see needed to be done; that while the mill was in operation, and while appellee was in the discharge of his duty as an employe, appellants "carelessly and negligently operated said mill and machinery, well knowing the same was unsafe and dangerous, in this: that the lineshafting was improperly arranged, that the attachment with the engine and saw was direct and dangerous, and that the fly or balance-wheel was an old, condemned, cracked and blemished wheel;" that while the mill was in operation the wheel suddenly broke into a number of pieces, which were thrown with great force in, around and about the mill; that one piece struck appellee with great force, producing injuries, described; that he was thus in-

jured by the "negligence and carelessness of the defendants in failing to provide proper and safe lineshafting, proper and safe attachment between the saw and engine, and a safe, secure and sound fly or balance-wheel;" that appellants well knew of the improperly arranged shafting, the direct and dangerous attachment, and the unsafe, insecure, cracked and blemished condition of the fly or balance-wheel, and that appellee at the time of and prior to the accident had no knowledge whatever of these conditions.

Appellee's counsel first insist that no question is presented upon the ruling on the demurrer to the complaint, because of appellants' failure to set out in their

1. brief the complaint and the demurrer. There is no merit in this objection to the brief. It gives in substance all the material averments of the complaint, and states where appellant's demurrer to the complaint will be found in the record, that "this demurrer insists that the complaint does not contain facts sufficient to constitute a good cause of action," and that the demurrer was overruled and exception reserved. It is not necessary to copy into the brief the pleadings, but if the substance is given the requirement of the rule is met.

The demurrer is upon the ground that the complaint "does not contain facts sufficient to constitute a good cause of action." Objection is made to the use of the

2. word "contain" instead of "state." If the complaint is bad for want of sufficient facts, it is immaterial whether it be said that it does not state sufficient facts, or that it does not contain sufficient facts. The meaning of the pleader in filing the demurrer is unmistakable. It is sufficient if the demurrer uses language equivalent to that of the statute. The demurrer in question does this. *Ross v. Menefee* (1890), 125 Ind. 432; *Petty v. Board, etc.* (1880), 70 Ind. 290; *Pace v. Oppenheim* (1859), 12 Ind. 533; *Stanley v. Peebles* (1859), 13 Ind. 232. The precise question here presented was decided adversely to

appellee in *Leach v. Adams* (1899), 21 Ind. App. 547.

Objection is made that the theory of the complaint is not clearly manifest from its averments. The basis of appellee's action is the alleged negligence or carelessness

3. of appellants in using, or permitting to be used, a defective fly wheel in their mill. There is nothing in the pleading to indicate that it proceeds upon the theory that appellee was put to work with a defective tool or machine, which was dangerous because of defects. It sufficiently appears that the wheel that caused the injury was a part of the mill machinery, and that appellee was in the employ of appellants, and when injured was in the discharge of his duty as such employe.

The further objection is made that the complaint does not directly aver that the wheel was defective. It is averred that appellants "carelessly and negligently

4. run and operated said mill and machinery, well knowing that the same was unsafe and dangerous in this, to wit: that the lineshafting was improperly arranged, that the attachment with the engine and saw was direct and dangerous, and that the fly or balance-wheel was an old, condemned, cracked and blemished wheel;" that appellee had no knowledge whatever of the improperly arranged lineshafting, nor of the effect of the direct attachment, nor of the unsafe, insecure, cracked and blemished condition of the wheel. It is also averred that while the mill was in operation the wheel suddenly broke into a number of pieces, which were thrown with great force in and about the mill, one of which pieces struck appellee. It is quite true that the inference to be drawn from these averments is that the wheel was defective; but it is expressly held in *McElwaine-Richards Co. v. Wall* (1902), 159 Ind. 557, where the averments were substantially like those here considered, that the inference can not take the place of a direct averment that the wheel was defective. In that case, in holding the complaint insufficient, the court said:

"From the two facts, as averred, that appellee did not know that the chord was unsafe, but that appellant did know that it was unsafe, the ultimate or issuable fact that the chord or plate in question was unsafe, is left to be inferred. The question with which we have to deal is not one in regard to evidence, but one which relates to pleading. While a court in dealing with evidence may be justified in drawing inferences from certain items of evidence, still it is not warranted in resorting to inferences or deductions where the question involved pertains to the sufficiency of pleading; for the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred, and can not be left to depend upon or to be shown by mere recitals or inferences;" citing *Avery v. Dougherty* (1885), 102 Ind. 443, 52 Am. Rep. 680; *Erwin v. Central Union Tel. Co.* (1897), 148 Ind. 365.

Upon the authority of *McElwaine-Richards Co. v. Wall*, *supra*, the complaint in the case at bar must be held insufficient, unless the following averment, when considered in connection with all the other averments, makes it sufficient in the above particular: "And plaintiff avers that he was thus injured by the negligence and carelessness of the defendants in this, to wit: in failing to provide proper and safe lineshafting, proper and safe attachment between the saw and engine, and a safe, secure and sound fly or balance-wheel." The injury was caused by the breaking of the wheel. What, if anything, the improperly arranged lineshafting and the improper attachment between the saw and engine had to do with the breaking of the wheel, is not in any way made to appear. It is not shown how or where this wheel was located with reference to any other part of the machinery in the mill, or what effect, if any, these other defects had in making the wheel dangerous when the mill was in operation. The extent of the above averment, when taken in connection with the other and preceding

averments in the pleading, is that appellee "was thus injured by the negligence and carelessness of the defendants" in failing to provide "a safe, secure and sound fly or balance-wheel." If the whole of this concluding averment be construed alone it adds nothing to the pleading on the point in question, and, when construed with all the other material averments, it in no way supplies the omitted averment. The issuable fact that the wheel was defective is still left to be inferred. The demurrer to the complaint should have been sustained.

Judgment reversed.

CLOW ET AL. v. BROWN ET AL.

[No. 5,206. Filed November 29, 1904. Rehearing denied March 10, 1905. Transfer denied January 24, 1906.]

1. JUDGMENT.—*Issues.—Debts.—Fraud.—Liens.*—Where a complaint alleged that a certain deed was fraudulent and void as to the plaintiffs, creditors of the grantor, and the answer was a general denial, and a second paragraph which showed that such deed was made to the grantee as a security for a certain debt, a decree declaring a lien for defendant in such sum and for the sale of such property subject to such lien is within the issues. p. 179.
2. CONTRACTS.—*Postnuptial.—Consideration.—Marriage.*—Marriage alone can not constitute a valuable consideration for a postnuptial contract. p. 182.
3. SAME.—*Postnuptial.—Consideration.—Antenuptial.—Discharge.*—Where a man entered into an antenuptial contract with his intended wife, whereby she released any claim to his estate in the event she survived him and agreed to receive from his estate in lieu of her statutory rights \$10,000, her release of such antenuptial contract by a postnuptial contract whereby she accepted a lien upon his property for a much smaller sum in full satisfaction thereof, is founded upon a valuable consideration. p. 182.
4. HUSBAND AND WIFE.—*Contracts Between Themselves.*—A husband may contract directly with his wife and *vice versa* under modern statutes. p. 185.

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5. HUSBAND AND WIFE.—*Descent.*—*Postnuptial Contracts.*—Where an antenuptial contract fixing the rights of property is abrogated by a postnuptial contract giving the wife a certain sum for the abrogation of such antenuptial contract, which she accepts, the husband at her death inherits under the law. p. 186.
6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Husband and Wife.*—*Preferences.*—The husband may prefer his wife in an assignment for the benefit of his creditors, where she agrees to release his antenuptial contract to pay her \$10,000 out of his estate as her share thereof as surviving widow, in consideration of a certain sum which is not grossly unjust to his creditors. p. 186.

From Montgomery Circuit Court; *Joseph M. Rabb*, Special Judge.

Suit by James B. Clow and others against James S. Brown and others. From a decree for part of their claim, plaintiffs appeal. *Affirmed.*

E. C. Snyder and *S. C. Kennedy*, for appellants.

Crane & McCabe and *Thomas A. Foley*, for appellees.

BLACK, C. J.—The appellants brought suit against the appellees, John S. Brown, Mary V. Brown and Fannie B. Coddington, upon a judgment rendered by the circuit court of Clinton county, January 9, 1900, in favor of the appellants against the appellee John S. Brown, and to set aside, as fraudulent, as against his creditors, certain conveyances of real estate, situated in Montgomery county, to the other appellees, and a mortgage of real estate in that county to the appellee Mary V. Brown, such conveyances and mortgage having been executed by appellee John S. Brown September 9, 1899. Issues having been formed, the cause was tried by the court and special findings were rendered. The court's conclusions of law are questioned here.

The court stated the facts substantially as follows: In 1854 John S. Brown was a married man, his wife being the daughter of John T. Blair, who in that year conveyed to John S. Brown certain real estate in the town of Crawfordsville, for the consideration of \$1,200, of which the sum of \$200 was paid by the grantee to the grantor, and

the remainder of the amount of the consideration was treated by the grantor as an advancement to his daughter, wife of the grantee. Afterward this property was by the grantee exchanged for certain real estate in Crawfordsville, which, for convenience, we will designate as tract A, for which Brown, in addition to the property so received from his father-in-law, gave the sum of \$500, taking the title to tract A in his own name. He occupied it, as he did the real estate which he so exchanged for it, as his own property, and he never expressly agreed to pay said sum of \$1,000 either to his wife or to his father-in-law. Afterward Mrs. Blair, the mother of Brown's wife, died intestate at Montgomery county, and he became the administrator of her estate; and as such he, in 1879, made his final settlement of the estate, in which it was shown that there was due to his wife, daughter of the decedent, as an heir of the intestate, and distributee of the estate, \$1,275, for which sum she executed to her husband her receipt, and he at the time executed to her his promissory note for that sum, with interest at the rate of eight per cent per annum. Afterward, in September, 1882, she was stricken with fatal illness, at which time he and she had two children, one being the appellee Fannie B. Coddington, the other being a son, James Brown. In view of her probable death, and for the purpose of dividing her property between these children, she requested her husband to execute to the children his notes for the sum so due her from him, and pursuant to this request he executed his note to the appellee Fannie B. Coddington for \$750, and his note to the son for the same amount, the sum of the two notes being the amount then due as principal and interest upon the note which theretofore he had so executed to his wife, in satisfaction of which the two notes were given. Afterward, the mother of these two children, wife of appellee John S. Brown, died intestate, and no administration was had of her estate. Thereafter the appellees John S. Brown and Mary V.

Brown (then Mary Vance), in contemplation of their marriage, entered into a written contract, signed and sealed by them respectively, in duplicate, December 17, 1886, the body of which contract was as follows:

“This article of agreement by and between John S. Brown and Mary D. Vance, both of the city of Crawfordsville, State of Indiana, witnesseth, that said parties now having in contemplation a marriage with each other, do hereby agree as follows: Said parties do hereby mutually agree to renounce and waive, and they do hereby renounce and waive, any and all rights of inheritance each may have under the law of the State of Indiana, by reason of said proposed marriage, to the property of the other; and it is further agreed that in case said Mary D. Vance shall survive said John S. Brown, that upon his death she shall be paid the sum of \$10,000 in cash out of the estate of said Brown, this sum to be paid in consideration of her waiver in the estate of said Brown as above set forth.”

At the time of the making of this contract Mary D. Vance was in good health and in the fortieth year of her age, and John S. Brown was in good health and was sixty-three years old. He was then in prosperous circumstances, and worth from \$40,000 to \$60,000. He was the owner of real estate of the probable value of \$30,000, and the court found that the contract was a just and reasonable provision for his wife, in his circumstances at that time. Pursuant to the contract, the parties thereto were duly married December 21, 1886. Subsequently to this marriage, and long prior to September 9, 1899, John S. Brown had incurred a liability to the appellants for a statutory penalty growing out of his relations with the Crawfordsville Water-Works Company, as a director thereof, and he and others had been sued by the appellants on account of such liability, and the action had been pending in the courts of Montgomery and Clinton counties since

August, 1889, and the proceedings finally culminated in a judgment duly rendered by the Clinton Circuit Court against John S. Brown and the estate of Robert B. F. Pierce for \$6,203.82, January 9, 1900. At that time the estate of Pierce was insolvent, and at no time has it had assets out of which any part of the judgment could be collected, which judgment is still in full force and wholly unpaid.

James Brown died intestate, leaving as his sole heirs at law his father, John S. Brown, and his sister, Fannie B. Coddington, and John S. Brown settled up the decedent's estate without an administrator. After payment of the liabilities of the estate, there remained in his hands, belonging to the estate, \$560, one-half of which was due to John S. Brown and the other half to Fannie B. Coddington. The amount thus due to the latter was never paid to her, but remained in the hands of John S. Brown, without any demand being made for it by her prior to the execution of the deed, hereinafter mentioned, from John S. Brown to Fannie B. Coddington. September 9, 1899, he was the owner in fee simple of certain real estate in Montgomery county, described in the finding, being lots numbered seventeen and twenty in a certain addition to Crawfordsville, which were of the value of \$3,200, and subject to a mortgage lien amounting to \$1,953.57; also a tract, which we will, for brevity, designate as tract B, worth \$2,800, and subject to a mortgage lien of \$151, also tract A, above mentioned, worth \$10,000, and a portion thereof described, which may be designated as the west part of tract A, was subject to a mortgage of \$3,800 in favor of a bank named, which bank also held as security for such debt a mortgage on another tract of land in that city which John S. Brown then owned, known as the "cooper-shop property," of the value of \$3,200, and subject to no other encumbrance. The bank also held as collateral security for the same debt an insurance policy on

the life of John S. Brown for \$4,000, which was also pledged to the bank to secure the payment of all sums advanced or that might be advanced by it in payment of premiums on the policy and any other debt that Brown might then owe the bank, which had then paid premiums amounting to \$1,343; and it was necessary, in order to keep the policy alive, to pay as premiums annually \$286, Brown being then seventy-six years of age. Said real estate was also encumbered by a mortgage executed by Brown to Crane & Anderson, to secure a debt of \$618. Brown also owned in fee simple lot number five in a certain addition to that city, of the value of \$1,400, subject to a mortgage lien of \$761.58, and he was and still is the owner in fee simple of other real estate in that city of the value of \$2,000, subject to valid liens amounting to \$900. He also owned personal property of the value of \$300, and was and is a householder of this State. He had no other property subject to execution, and has not since had sufficient property subject to execution to pay his debts, and he has been insolvent at all times since that date. He was then justly and legally indebted to his daughter, the appellee Fannie B. Coddington, in the sum of \$1,916.50. For the purpose of securing to her the payment thereof, and at the same time placing the property hereinafter mentioned beyond the reach of the appellants on execution or other legal process to satisfy their demands against him, in case they should recover judgment against him in the then-pending litigation, Brown executed to his said daughter the deed mentioned in the complaint herein, by which he conveyed to her, for the expressed consideration of \$1,875, tract A and lot number five above mentioned. At the time of the execution of this deed, and for several years prior thereto, Fannie B. Coddington lived in the state of Nebraska, and she had no notice or knowledge of her father's financial condition. The deed was drawn up and signed and acknowledged in Crawfordsville, Indiana, without con-

sulting with Fannie B. Coddington, and without request from her, and was transmitted by Brown through the mails to her at Kearney, Nebraska. It was received by her as security for the payment of the sum due her from her father. Brown continued to use, occupy and control the property after the execution of the deed as he had done before. The deed was returned by Fannie B. Coddington to her father with direction to have it put on record, and it was duly recorded in the recorder's office of Montgomery county, October 19, 1899.

John S. Brown, September 9, 1899, executed to his wife, appellee Mary V. Brown, a deed of conveyance for lots numbered seventeen and twenty and tract B above mentioned, and a mortgage on the eastern and greater portion, described, of tract A. This mortgage was given to indemnify the mortgagee from the payment of a balance of \$155.30, due to a bank named, and secured by mortgage on the property that day conveyed by Brown to his wife, and also to secure and indemnify her against the payment of a debt of \$1,500, and interest thereon, secured by mortgage in favor of one Thomas on the property so conveyed to her. The conveyance and mortgage were so executed by John S. Brown, and were accepted by Mary V. Brown, "in lieu and in satisfaction of" the antenuptial contract above mentioned, and were so executed by John S. Brown in view of the fact of his insolvency, and with full knowledge of both parties thereto of his financial condition at the time. The court found that there was due Fannie B. Coddington, upon the indebtedness of her father to her, which it was intended to secure by his said deed to her, \$2,323.70, and that there was due the appellants on their judgment \$7,425.

The court stated as conclusions of law: (1) That the deed and mortgage executed by John S. Brown to Mary V. Brown are valid and effectual to convey to her the title of the premises described in the deed, and to indemnify

her against the liabilities described in the mortgage, free from the demands of the appellants or other creditors of John S. Brown; (2) that the deed executed by John S. Brown to Fannie B. Coddington is void and ineffectual in conveying the title to the premises therein described to her, as against the demands of the appellants as creditors of John S. Brown, but that she, under that deed, is entitled to hold a lien upon the premises, as against such demands, for \$2,323.50, with interest from the date of the special findings; (3) that the appellants are entitled to have the premises described in the deed of John S. Brown to Fannie B. Coddington, and such other real estate as John S. Brown owned, subject to execution, sold to pay and satisfy their debt, freed and discharged from any claim thereon of Mary V. Brown as the wife of John S. Brown, but subject to all prior valid liens existing against the same.

It is claimed on behalf of the appellants, with reference to appellee Fannie B. Coddington, that as the answers filed by her were answers in bar of the action, and as she

1. filed no cross-complaint and asked no affirmative relief, the finding that she held a lien upon the real estate conveyed to her was outside the issues made by the pleadings, and should be disregarded.

The complaint alleged that the conveyance to Fannie B. Coddington was fraudulently made without any valuable consideration, and that she at the time knew that it was made without valuable consideration and for the purpose of enabling John S. Brown to cheat, delay and defraud his creditors, and especially the appellants. The separate answer of Fannie B. Coddington was in two paragraphs, the first being the general denial. In the second paragraph she admitted that September 9, 1899, John S. Brown was the owner of real estate described—being that described in his deed of conveyance to her of that date—and that on that day he and his wife executed a deed conveying it to Fannie B. Coddington; and it was alleged that this deed

was executed to her by him on account of an indebtedness then due and owing by him to her; that he was indebted to her on account of moneys then due and owing by him to her, and the conveyance was made by him to her for the purpose of securing her in the payment of such debt, and for no other purpose; and she denied that it was executed by him for the purpose of defrauding, hindering or delaying the creditors, including the appellants, and alleged that it was executed in good faith and for the purpose of securing the payment of said debt.

The second paragraph did not contain an express statement that it was pleaded as a defense in part. It was the separate answer of Fannie B. Coddington alone, and as such it was sought thereby to defend against so much of the cause of action stated in the complaint as affected her interest in the real estate created by the conveyance to her, attacked by the complaint as having been executed to defraud the creditors of the grantor. It denied that the conveyance was executed for such purpose, and showed its true character—that it was a deed of conveyance executed as a security for the payment of a preëxisting *bona fide* debt, and therefore a mortgage given by way of preference of a creditor. It did not contain a prayer for the foreclosure of the mortgage lien, but it asserted, in effect, the existence of such lien. It did not seek to present any reason why the real estate should not be subjected to sale as the property of the grantor for the payment of the judgment of the appellants, but it stated facts which, if true, as they were found to be by the court, should require that such sale be made subject to the mortgage lien. The complaint treated the deed to Fannie B. Coddington as one whereby it was intended to convey the absolute title, and sought to set it aside as fraudulent, so that the real estate might be subjected to the payment of the judgment, free from all claims based upon that deed of conveyance. The answer opposed such demand of the appellants by showing that the deed of con-

veyance created a *bona fide* mortgage lien, and, while not controverting the right of the appellants to have the real estate subjected by sale to the payment of the judgment, showed that the appellee Coddington, the defendant separately answering, had a superior mortgage lien. This defendant had no interest in disputing generally the right of the appellants to have the real estate sold upon their judgment. She was only interested in asserting and protecting her lien, and her second paragraph of answer, the sufficiency of which has not been questioned here, appears to have been treated as having been pleaded for such purpose, and it would seem to be but justice to all the parties that it should be so treated in this court.

As against the appellants, seeking to set aside the conveyance as one made and accepted to hinder, delay and defraud the creditors of the grantor, it was not outside the issues, and beyond the province of the court trying them, to find that the conveyance was executed as a security for a debt, and, because of this and the other facts found, constituted, as against the appellants, a lien upon the real estate. The court did not in its conclusions of law declare that the grantee was entitled to a foreclosure of her lien. It held that the appellants were entitled to have the land sold subject to the lien. This was all they were entitled to as against the appellee Fannie B. Coddington. They had not established their claim that the deed was invalid because of fraud against creditors. It was proper for the court to find and declare the true character of the conveyance as a security for a debt, constituting a lien on the real estate. If the conveyance was executed as a security for a *bona fide* demand—as a preference of a preëxisting debt not voidable for fraud against creditors—this, we think, was a sufficient reason why, under the answer of general denial, the appellants should not recover greater relief than that given them as against Fannie B. Coddington.

There is somewhat greater difficulty in determining the question in relation to the postnuptial conveyance and mortgage from Brown to his wife. It is contended

2. on behalf of the appellants that the antenuptial contract between them was so framed that it did not make Brown the debtor of his wife, and that they could not, as against the appellants, make a postnuptial settlement of that contract, except in accordance with the terms of the contract itself. If it were necessary to refer to the marriage itself as the consideration for the postnuptial conveyance and mortgage, it is plain that the conveyance and mortgage must be regarded as voluntary. The irrevocable marriage union could not constitute a valuable consideration for a subsequent agreement of the parties thereto.

But if the execution of the conveyance and mortgage may be regarded as having a valuable consideration other than the marriage, and as being a preference of a

3. preëxisting debt of the husband to the wife, then, under the facts shown by the court's finding, the conveyance and mortgage must be upheld against the attack of the husband's creditors.

In *Reade v. Livingston* (1818), 3 Johns. Ch. 481, 8 Am. Dec. 520, it was said: "The settlement was a voluntary one. There was no portion advanced by or on behalf of the wife, nor was it founded on any antenuptial contract duly ascertained, or on any other valuable consideration." The chancellor thus indicates what is necessary to support a postnuptial settlement.

A postnuptial settlement, if not shown to be made pursuant to and in compliance with a valid antenuptial agreement therefor, must, as against existing creditors, be regarded as voluntary, unless founded upon a valuable consideration other than the marriage. See *Reade v. Livingston, supra*; *Lavender v. Blackstone* (1676), 2 Lev. 146.

In *Saunders v. Ferrill* (1840), 1 Ired. 97, 102, it was said: "Valid antenuptial contracts will undoubtedly sup-

port a settlement made after marriage in conformity to them. There is both a moral and an equitable obligation, which render the articles a good consideration for the settlement. But without such articles, a postnuptial settlement is voluntary and void under the Stat. 13 Eliz. (see 1 Rev. Stat. Ch. 50, §1), as has long been settled. So it necessarily must be, when by the settlement the husband secures to the wife or issue of the marriage more than by the articles he engaged." See *Maguire v. Nicholson* (1818), Beatty 592.

In *Magniac v. Thomson* (1833), 7 Pet. *348, *393, 8 L. Ed. 709, it was said by Story, J.: "Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. * * * Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are, therefore, deemed, in the highest sense, purchasers for a valuable consideration."

The wife may, under such articles, become a creditor of her husband upon his undertaking therein to make an investment of money in her behalf, and a delivery of notes in part performance of the articles was upheld against other creditors of the husband. *Magniac v. Thomson, supra*.

In *Reade v. Worthington* (1862), 9 Bosw. 617, 628, it was said that there is no "principle which puts a contingent liability beyond the possibility of being protected."

In *Rider v. Kidder* (1805), 10 Ves. (Sumner's ed.) *360, under a covenant upon marriage by the husband with the trustees, in case his wife should survive him, to pay her a sum of money, it was held that she was a creditor within the statute of Elizabeth against fraudulent convey-

ances, as against a fraudulent conveyance made by him to a third person, in a suit to set aside the fraudulent conveyance brought after his death by his widow as executrix.

In *Blow v. Maynard* (1830), 2 Leigh 29, Carr, J., gave the subject of postnuptial settlements an examination, cited a number of cases, and said, that the giving up of an interest in the settler's estate will support such a settlement. "The cases," he said, "also show, that not only the relinquishment by the wife, of a certain and fixed interest in her husband's estate, but also of a contingent interest, will support a postnuptial settlement, where there is no badge of fraud; as the giving up her interest in a bond, though contingent. 1 Eq. Ca. Abr. 19; [*Ward v. Shallet* (1750),] 2 Ves. Sr. 16. So, likewise, the releasing her jointure or dower. [*Ball v. Burnford* (1700),] Prec. Ch. 113; [*Scot v. Bell* (1673),] 2 Lev. 70, 147; [*Cottle v. Fripp* (1691),] 2 Vern. 220."

In the case last cited a husband had settled on his wife a jointure issuing out of certain real estate. Later the wife joined the husband in a sale of that real estate, "and in consideration thereof, and in lieu of her jointure," the husband gave a certain bond in her favor, which was upheld as against a subsequent creditor of the husband.

In *Scot v. Bell*, *supra*, a wife joined in an alienation of her jointure, and had another made the same day. It was held that the new settlement was not voluntary. It was said by Hale and the court that the second settlement was not void as to a subsequent lease made by the husband, "for the old settlement being destroyed, and the new made the same day, an agreement by him to make the new settlement, in consideration the wife would pass the fine and bar the old settlement, shall be intended, and the consideration shall extend to all the uses of the new settlement; for it shall not be presumed that the wife would have parted with her estate by the old settlement, unless the baron would make the same provision for her and her issue by

the new." In that case the lands in the new settlement were said to be almost of double value to those in the first settlement, yet by direction of the court the jury gave their verdict sustaining the new settlement.

In *Ward v. Shallet, supra*, a wife had a contingent interest under a bond given by her husband on the marriage. She agreed to part with that interest upon her husband's making another settlement upon her. It was said by the lord chancellor that the parting with her contingent interest under the bond was a clear consideration; that a contingent interest may be a consideration as well as a certain interest; and that the wife, insisting on the benefit of it, was barred from any claim under the bond.

By the terms of the antenuptial contract, Brown and his prospective wife, in contemplation of the marriage, renounced and waived all the rights of inheritance of either of them under the law by reason of the marriage, and agreed that if the wife should survive the husband, she upon his death should be paid \$10,000 in cash out of his estate, in consideration of her said waiver in his estate.

The conveyance and mortgage were executed by the husband and accepted by the wife "in lieu and in satisfaction of the antenuptial contract."

They were not executed pursuant to the antenuptial contract, or by way of carrying into effect any contract made in consideration of the marriage; nor can the marriage be regarded as entering into the consideration for the conveyance and mortgage. Under our modern statu-

4. tory system, the husband and wife could contract with each other without the intervention of a trust.

By the postnuptial settlement, if valid, the antenuptial contract was abrogated in consideration of the new settlement, and all the rights and obligations of the parties, respectively, created by the earlier contract, were set aside. The husband was freed from any obligation under that contract for the payment of money to the wife out of his

estate, and was restored to any rights in her property renounced and waived thereunder, while her renunciation and waiver therein of rights of inheritance by virtue of the marriage were also abrogated, for the new settlement was in lieu of the old contract and in satisfaction of it, and not merely of the contingent promise therein. It does not appear what property, if any, the wife owned, other than that obtained in the postnuptial settlement. The

5. property which she thus acquired, and any other real estate owned by her, or of which she might afterward become seized, would be held by her subject to the rights of a husband in the property of his wife under the law.

If any advantage of value was lost by the wife or gained by the husband through the abrogation of the old contract, it can not be said that there was not a valuable consideration for the new contract.

While a contingent indebtedness, or obligation to pay upon a contingency, is not for some purposes to be regarded as a present debt, yet, under the authorities, such

6. a contingent liability as is here involved may be preferred by the debtor in failing circumstances. We have no means of determining that the consideration for the conveyance and mortgage was so grossly inadequate as to invalidate them at the suit of creditors.

We do not find any substantial ground of complaint on the part of the appellants against the conclusions of law. Judgment affirmed.

ZUELLY ET AL. v. CASPER ET AL.

[No. 5,957. Filed January 24, 1906.]

1. PLEADING.—*Answer.—Failure to Demur.—Testing Same by Questioning Sufficiency of Evidence.*—Where plaintiffs fail to demur to defendants' answers, they may question the sufficiency of such defenses by objecting to the sufficiency of the evidence. p. 188.

2. **INTEREST.—Officers.—Unlawful Fees.**—Where public officers retain illegal fees, they are chargeable with six per cent interest thereon to the time of payment. p. 190.
3. **OFFICERS.—Fees and Salaries.—Illegal Allowances.—Right to Retain.**—The allowances by the boards of commissioners of unlawful fees to public officers is no justification for the retention of same. p. 191.
4. **COMPROMISE AND SETTLEMENT.—Dismissal of Suit.—Officers.—Boards of Commissioners.—Unlawful Fees.—Statutes.**—Where a county auditor retained unlawful fees allowed by the board of commissioners his compromise by the repayment of a less sum to such board is ineffectual to release him, and a dismissal of a pending suit by such board does not affect the matter, since by §7913 Burns 1901, §5811 R. S. 1881, settlements by public officers' paying less than the amount due and owing are not conclusive nor binding on the public. p. 191.
5. **DISMISSAL AND NONSUIT.—Rights of Parties.—Statutes.**—Under §336 Burns 1901, §333 R. S. 1881, plaintiff may dismiss his cause of action at any time before the jury retires or before the court's decision is announced, the effect being that plaintiff must pay the costs, and such dismissal does not preclude the bringing of a new case for the same cause. p. 192.
6. **JUDGMENT.—Res Judicata.—Estoppel.**—A judgment in form: "And on motion of plaintiff this cause is dismissed by agreement, at the plaintiff's costs," is not *res judicata* as to the merits of the cause, and defendant is not thereby estopped from filing a new action for the same cause, no fraud being shown and defendant being cognizant of all of the facts. p. 192.
7. **PLEADING.—Complaint.—Amendments.—Abuse of Discretion.**—Where plaintiffs asked leave to amend their complaint, after the evidence had been received, to show that the court should take into consideration a sum alleged to have been paid as a compromise, the overruling of such request was erroneous as an abuse of legal discretion. p. 193.
8. **APPEAL AND ERROR.—Law of the Case.**—Where the Supreme Court has held a complaint good upon a prior appeal, its decision is the law of the case on subsequent appeals. p. 193.
9. **COMPROMISE AND SETTLEMENT.—New Suit.—Return of Consideration.**—Where defendant pays a certain sum for the dismissal of a pending suit, or pays such sum in an attempted discharge of a larger liquidated sum, it is not necessary to tender such sum back when a new action is brought for the same cause. p. 193.
10. **LIMITATION OF ACTIONS.—Officers.—Individual Actions for Recovery of Illegal Fees.**—A suit by taxpayers against a county

- auditor individually for the recovery of illegal fees retained, is not barred by the five-year statute of limitations prescribed for certain actions by §294 Burns 1901, §293 R. S. 1881. p. 193.

From Perry Circuit Court; *C. W. Cook*, Judge.

Suit by Adolph Zuelly and others against Martin F. Casper and another. From a decree for defendants, plaintiffs appeal. *Reversed*.

John W. Ewing and *Sol. H. Esarey*, for appellants.

William T. Zenor, *Philip Zoercher*, *Jerry L. Suddarth* and *M. D. Casper*, for appellees.

ROBY, C. J.—This is the second appeal. *Zuelly v. Casper* (1903), 160 Ind. 455, 63 L. R. A. 133. Before this action was begun the Perry Circuit Court enjoined the board of county commissioners from proceeding with its employed expert accountant to investigate the books, papers and records of the offices of auditor and treasurer of said county. An appeal was taken by the board and the person with whom it had contracted. Pending the appeal there was a change in the membership of the board. It thereupon filed a dismissal; but its coparty continued in court, and the judgment was reversed. *Board, etc., v. Gardner* (1900), 155 Ind. 165.

Before the change in membership above referred to took place, an action was begun by the county against appellee Casper for the recovery of alleged illegal fees held by him. The questions presented by this appeal principally arise, as will be hereinafter shown, from the disposition made of that action.

Appellee Casper answered in eleven paragraphs, he and the board answered jointly in one paragraph, and the board answered separately in two paragraphs. No de-

1. murrer was addressed to any paragraph of answer, but the issue was closed by replies. The appellants were not bound to demur, and are entitled to make their objections to the sufficiency of the evidence. *Ayres v.*

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Blevins (1901), 28 Ind. App. 101. The issues were broad enough to present the questions hereafter discussed. Trial was had and finding for appellees. Appellants' motion for a new trial was overruled, and such ruling forms the basis of the error assigned. In this action appellants, taxpayers of the county, seek to recover illegal fees on behalf of the county, which it is alleged, as shown by the opinion in *Zuelly v. Casper, supra*, are in the hands of its enemies.

The illegal fees which are sought to be recovered in this suit include those to recover which action was originally brought by the board of commissioners, although a large number of items are included in the bill of particulars in this case which were not embraced in that one. It is claimed by appellees that the matters which are now sought to be litigated were adjudicated in the prior action, that the county is estopped by conduct from setting up its claim, that the unwillingness of the board to bring this suit was not proved, that it can not be maintained without showing a return of, or an offer in the complaint to return, the amount paid by Casper, as hereafter set out, and that the action is barred by the statute of limitations. The circumstances connected with the disposition of the prior action are, according to the testimony of Cassidy, who was then a member of the board, that one of Casper's lawyers called on him and said: "Now, we would like to have a talk about this matter. It is coming up for trial to-morrow morning, and, if we could settle this matter, probably it would be better." The meeting took place and resulted in the execution of an instrument in terms as follows:

"Cannelton, Indiana, May 8, 1900. Received of Martin F. Casper, the sum of \$1,425.77, same in full of all dues, demands, rights and credits due and owing to the county of Perry, in the State of Indiana, from said Martin F. Casper for money illegally paid him by the board of commissioners of said county at the time and while said Casper was auditor of said

county, said money being paid in by said board and illegally allowed him as such auditor for service as such auditor. That this settlement and said amount as received as aforesaid is in full satisfaction of all demands of whatsoever nature or description due and owing to said county by said Casper as such auditor, and that the suit now pending against him before the Perry Circuit Court, No. 266 on the docket of said court, wherein the board of commissioners is plaintiff, and said Martin F. Casper is defendant, shall this day be dismissed."

An entry was thereupon made in the commissioners' record following the language of the receipt and a dismissal entered in the circuit court as follows: "And on motion of plaintiff this cause is dismissed by agreement, at the plaintiff's cost."

A specific bill of particulars is filed with the complaint. Its accuracy was established upon the trial without much controversy. To the amount withheld, interest at 2. six per cent should be added. *Tucker v. State, ex rel.* (1904), 163 Ind. 403. This claim, amounting to about \$6,000, was discharged by the board, so far as they had power to discharge it, upon the payment of \$1,425.77. This sum was fixed upon, according to the testimony of the witness Cassidy, by excluding from the charge against the auditor all items barred by the statute of limitations and by giving him credit for \$250, which was claimed by him for making a statement of the indebtedness of the county, one of the commissioners saying: "I always wanted that claim paid because he did the work."

The questions, both of law and fact, connected with the application of the statute of limitations, are questions of difficulty. There does not seem to have been any exigency requiring immediate action, so far as the county was concerned, and an immediate determination by a court of competent jurisdiction, whose conclusions were reviewable,

could have been had. The county could lose nothing through such trial and judgment, since it was demanding only that which belonged to it. In order to fix upon the amount named, it must have been necessary to concede every claim made by the auditor. That some such process was followed is indicated by the fact that the \$250 credit above referred to was made in addition to those on account of the statute of limitations, and that the service for which such sum was allowed was one which it was the duty of the auditor to make, his neglect or refusal to make it being a misdemeanor punishable by a fine of not less than \$100 or more than \$500. §7918 Burns 1901, Acts 1891, p. 45. The inclusion of this amount in the credits avowedly given the auditor in such attempted settlement imparts character to the entire transaction, tends strongly to overthrow the presumptions accorded to public officers, and sufficiently establishes the necessity for and right of the appellants to maintain this action.

It is well settled that the allowance of illegal claims by the board to the officer does not furnish a justification to him for the retention of the amounts thus secured.

3. *Tucker v. State, ex rel., supra.* It was said in the prior appeal (*Zuelly v. Casper, supra*): "The board can no more make donations of the public revenues to a county officer than it can bestow such favors on a private individual."

The statute contains an express limitation upon their power in this respect: "No settlements made by the board of commissioners of the several counties of this

4. State with any county, township or school officer shall be conclusive and binding on the state or county, where any such officer has failed, in any manner, to account for any and all moneys which he may have collected or received by virtue of his office, or has failed or omitted to perform any duty required of him by law; and

every such officer and his sureties shall be held liable therefor, the same as if no such settlement had been made. §7913 Burns 1901, §5811 R. S. 1881. It necessarily follows that the auditor was not released by such settlement from liability for the repayment of moneys illegally held by him, nor is the power of the board extended by the entry of dismissal in the circuit court. The agreement there referred to is the agreement of the board, limited exactly as it would be if otherwise evidenced.

The judgment of a court having full jurisdiction concludes the parties upon the issue submitted to it. It is claimed that the dismissal of the prior action

5. amounts to such judgment. What the rule was in equity or at common law (the record does not purport a determination of the issue by the court) is immaterial in view of the statutory provision: "An action may be dismissed without prejudice, First. By the plaintiff, before the jury retires; or, when the trial is by the court, at any time before the finding of the court is announced." §336 Burns 1901, §333 R. S. 1881. The penalty for such dismissal is the payment of costs. A second action is presumed to be vexatious and its prosecution will be stayed until such costs are paid or a valid excuse for nonpayment shown. *Eigenman v. Eastin* (1897), 17 Ind. App. 580.

That an agreement to pay money in consideration of the dismissal of a pending action is valid, is beside the question here presented. *Jones v. Rittenhouse* (1882),

6. 87 Ind. 348; *Moon v. Martin* (1890), 122 Ind. 211. The defense of *res judicata* is not available. Neither is any estoppel shown. No actual fraud has been practiced upon the appellee Casper, and he has at all times been in full possession of all facts, while he has paid nothing except what was his to pay. Indeed, no element of estoppel is in the case.

With regard to the repayment or offer of repayment of the \$1,425.77, it may be noted that upon the conclusion of

the evidence appellants asked leave to amend their

7. complaint so as to pray the court to take into consideration in its decree said sum thus paid, to which amendment appellees objected, their objection being sustained. If the present contention were granted, then the action of the court in refusing to allow said amendment would be a clear and palpable abuse of discretion. In the

former appeal the complaint was held to state a

8. cause of action. The law of the case thus established controls subsequent proceedings. *Keller v. Gaskill* (1898), 20 Ind. App. 502. If the amount paid was paid for the dismissal of the pending suit, then its return was not a prerequisite to the trying of the present action. The party receives all for which he con-

9. tracted. *Reddick v. Keesling* (1891), 129 Ind. 128, 135. If it was a mere payment upon the amount due the county, the agreement to discharge was *nudum pactum* and the residue may be recovered. *Bateman v. Daniels* (1839), 5 Blackf. 71.

The appellee Casper answered the five-year statute of limitations. Under §294 Burns 1901, cl. 2, §293 R. S.

1881, suits upon the bonds of public officers, for

10. breach of official duty, are limited to five years.

This is not a suit upon an official bond, and the limitation thus fixed does not apply. It will be time enough to determine other questions relative to the statute of limitations, as applied to the peculiar facts of this case, when they are presented.

The judgment is reversed, and the cause remanded, with instructions to sustain appellants' motion for a new trial and for further proceedings.

Black, P. J., Wiley, Myers and Robinson, JJ., concur.
Comstock, J., absent.

MUNCIE PULP COMPANY v. HACKER.

[No. 5,214. Filed January 25, 1906.]

1. **PLEADING.—Complaint.—Master and Servant.—Factory Act.**—A complaint showing that defendant operated an emery-wheel without any exhaust-fans or other means of protection, and that plaintiff, while working thereon under defendant's orders, was injured thereby, while in the exercise of due care, states a cause of action under the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9). p. 203.
2. **SAME.—Complaint.—Factory Act.—Practicability of Guarding Machinery.**—A complaint declaring upon a breach of the provisions of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) which alleges that the emery-wheel, in the use of which the injury occurred, was not provided with an exhaust-fan, that it was dangerous and that it was practical to operate it with exhaust-fans, is sufficient regardless of whether the impracticability of guards is a matter of defense as indicated in *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, or whether practicability is a matter to be affirmed by plaintiff in his complaint as indicated in *Laporte Carriage Co. v. Sullender*, 165 Ind. 290. p. 204.
3. **SAME.—Complaint.—Factory Act.—Knowledge.—Effect.**—A complaint for damages for injuries caused by defendant's violation of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) does not need to negative plaintiff's knowledge of the defect. p. 204.
4. **STATUTES.—Factory Act.—Exhaust-Fans.—Dust.—Question for Jury.**—Where the statute (§7087i Burns 1901, Acts 1899, p. 231, §9) requires employers to provide emery-wheels with exhaust-fans to carry away the "dust," the court can not, as a matter of law, say that "dust" does not include particles of emery or metal large enough to injure the eye, such question being for the jury. p. 205.
5. **TRIAL.—Instructions.—Factory Act.—Including Alleged Negligent Acts Conjunctively.**—An instruction in an action for damages on account of defendant's violation of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) stating that if the jury find that defendant failed properly to guard an emery-wheel, and failed to provide exhaust-fans, and failed to provide any shield or protection for the eyes, such failure would be negligence, is erroneous in requiring plaintiff to prove three acts of negligence, one only being necessary; but defendant can not complain thereof. p. 206.

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6. **TRIAL.—Negligence.—Several Acts Alleged.—Proof of One.**—Where several negligent acts are alleged, proof of one is sufficient to establish the case. p. 207.
7. **SAME.—Inapplicable Instructions.—Effect.**—An instruction, though erroneous, stating a general proposition of law inapplicable to the case, where the court does not apply it to the facts of the case, is harmless. p. 208.
8. **SAME.—Instructions.—Negligence.—Shortening Life.—Damages.**—An instruction that the jury may consider the shortening of plaintiff's life by reason of the alleged negligence for the purpose of determining the extent of his injuries, the consequent disability to make a living, and the mental and bodily suffering which may result, but not to grant damages therefor, is not erroneous. p. 208.
9. **DAMAGES.—Prospective Pain.—Negligence.**—Plaintiff is entitled to recover for pain and suffering reasonably certain to result from his injuries received by reason of defendant's negligence. p. 208.
10. **TRIAL.—Instructions.—Answers to Interrogatories.—Negligence.**—Where defendant requested an instruction that if there were two ways to do a thing, one safe, the other dangerous, and plaintiff chose the dangerous way, he was negligent and can not recover, which instruction was refused, the jury's answer to an interrogatory, upon conflicting evidence, that the way followed by plaintiff was the right way to do the work, renders such refusal harmless. p. 209.
11. **SAME.—Instructions.—Answers to Interrogatories.**—Where the answers to the interrogatories to the jury show that appellant was not injured by the giving or refusal of instructions, the judgment will not be reversed, though the court's rulings were erroneous. p. 209.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Action by Edmond H. Hacker against the Muncie Pulp Company. From a judgment on a verdict for plaintiff for \$3,000, defendant appeals. *Affirmed.*

Thompson & Thompson, for appellant.

George H. Koons and *H. F. Wilkie*, for appellee.

ROBINSON, J.—Appeal from a judgment for damages for personal injury. Appellant assigns as errors: (a) Overruling the demurrer to the complaint; (b) overruling

the motion for judgment on answers to interrogatories; and (c) overruling the motion for a new trial.

The complaint avers, in substance, that appellant is a corporation manufacturing pulp and paper, having large and extensive buildings and machinery, and on November 10, 1902, employed appellee to operate and run an engine in its factory; that John O'Day was appellant's master mechanic, whose orders and directions appellee, as an employe of appellant in its service, was bound to conform to and obey; that appellee was employed to work for appellant by O'Day, and was put to work under and subject to his directions at setting valves in the engines, which work occupied about ten days; that thereafter appellant's general superintendent ordered O'Day to put the employes, including appellee, to work at changing some pumps in the factory, which work occupied several days; that thereupon O'Day, under appellant's orders, took the employes back to the engineroom, where they continued to work under O'Day's directions until between December 25, 1902, and January 1, 1903, at which time appellee was put to work for a short time laying a pipe-line on appellant's factory grounds, after which he was put to work under O'Day's directions in the machine-shop, where he worked, until injured, at different and more hazardous work, and where he was required to work at an emery-wheel, which was unguarded and without exhaust-fans, of which hazards and dangers appellee was ignorant; that there was in the machine-shop, as a part of the machinery, a mandril, with an emery-wheel on each end, which wheels were used for sharpening tools and grinding off the rough edges of pieces of iron, and which, when in use, made from eight hundred to one thousand revolutions per minute; that appellant had for more than a year "negligently and carelessly failed, neglected and omitted properly to guard, or to guard at all, said certain machinery and emery-wheels, or either or any of them, or to cause the same or any of them to be

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properly guarded, or to be guarded at all by any hood, shield, protection or device of any kind or description, or in any manner whatever, or to provide any device or protection for shielding or protecting the face and eyes of its employes working at and required to work at said emery-wheels," and had "carelessly and negligently failed, neglected and omitted to provide exhaust-fans of sufficient power, or any exhaust-fans at all, or device of any kind for the purpose of carrying off dust and sparks and particles from its said emery-wheels in and from its said manufacturing establishment where the same were being used;" that the emery-wheels in operation when unguarded, were dangerous to persons working at them and to persons doing such work as was required by appellant of its employes, which was well known to appellant, and that such wheels when operated without any hood or protection of any kind to prevent particles of dust and iron and steel from being thrown off and against persons working at them, and without any exhaust-fans or other device to carry off dust and particles set free from their operation, were dangerous, which facts were well known to appellant, but were not known to appellee; that he had no warning thereof from appellant, and appellant, well knowing the facts, gave him no notice or warning; that these wheels were about twelve inches in diameter and the width of the rim was about two and one-half inches; that they could have been easily and effectually guarded by a metal hood or shield attached to the frame on which the mandril worked, and carried around over the wheels towards the position in which the persons working at them would properly stand, sufficient to arrest the sparks and particles and dust that would otherwise be carried around with the swift revolutions of the wheels, and fly off at a tangent against persons working at them, or could have been otherwise guarded by properly constructed devices, which appellant, its superintendent and agents knew; that appellant owed to its employes, requir-

ed to work at such wheels, the duty properly to guard the same and prevent the danger from them unguarded, which duty appellant well knew, but neglected to perform; that the failure, neglect and omission properly to guard the wheels and to provide exhaust-fans or other sufficient device to carry off dust and particles from the wheels, and the consequent unguarded condition of the wheels, constituted a defect in the ways, works, plant, tools and machinery in use by appellant, which was the result of such negligence on the part of appellant and of the persons entrusted by it to keep the ways, works and machinery in proper condition; that on January 1, 1903, appellee, as such employe, while working in the machine-shop, under and subject to the orders of O'Day, was ordered and directed by O'Day to take a piece of iron with rough edges and square corners to an emery-wheel and grind off and smooth the ends, which order appellee was bound to conform to and obey and did conform to and obey, and while in the act of grinding off the ends and corners thereof, and in the exercise of due diligence on his part, small particles or pieces of steel or iron or some material were thrown from the wheel, striking appellee in the eye, and causing pain, suffering, sickness and the final loss of the eye, "all of which was wholly caused by the negligence of the defendant aforesaid and without any want of care and diligence on his part;" that if there had been at such time and place a proper hood, shield or proper guard over the wheel to prevent particles from being thrown from the wheel against a person working at it, and the same had been properly provided with exhaust-fans or other device to carry off dust particles, such injury would not and could not have occurred to appellee; that it was practical to operate such emery-wheels with such properly constructed hood, shield or other proper guard, device or protection, and to provide the same with proper exhaust-fans and other devices to carry off dust and particles set free by the operation of the wheels, so that such injury

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could have been prevented, all of which appellant and its agents in charge of its factory well knew, but carelessly and negligently failed and omitted to do or cause to be done, whereby and by reason whereof appellee received and suffered such injury while in the exercise of due care and diligence and without any fault or negligence on his part.

In answering two sets of interrogatories the jury found substantially the following facts: Appellant employed appellee in November, 1902. O'Day was appellant's master mechanic, and appellee was bound to conform to and obey his orders. O'Day employed appellee as an engineer, and first put him to work setting the valves in the engine, which work occupied about ten days, and thereafter O'Day put appellee to work at changing the location of some pumps, which work occupied several days. Afterward O'Day had appellee working in the engine-room until between the latter part of December, 1902, and January 1, 1903. He worked a short time laying a pipe-line on the factory premises, and was then put to work by O'Day in the machine-shop, where he worked until injured on January 1, 1903. He was required to work at emery-wheels which were unguarded and were not provided with exhaust-fans, which work was attended with greater hazards and dangers to appellee's eyes than the work of running an engine, which he had been employed to do. Appellee was wholly inexperienced in working at emery-wheels prior to the time he was put to work by appellant in its machine-shop, and did not know the danger of doing work at the emery-wheels, and was not warned by appellant or any one of the danger from particles of iron or steel or emery set free from the wheels. The wheels were not protected by hoods or devices of any kind, nor with exhaust-fans or devices to carry off dust and particles. It was practicable to guard the wheels without interfering with their operation or usefulness, and no device or protection of any kind was fur-

nished to shield or protect the eyes of employes operating the emery-wheels. Ordinary care and prudence required appellant to furnish employes working at the emery-wheels eyeglasses set in closely-woven network, shaped so as to fit over the eyes close up to the face, or some other sufficient device or protection to shield the eyes while at work at the wheels. It was practicable for appellant to provide for the use of its employes some sufficient, proper device or protection to shield or protect the eyes of employes required to work at the emery-wheels, and it was practicable to furnish eyeglasses made as above stated. The wheels unguarded were dangerous to the eyes of employes operating them, but appellee did not realize the danger, and was not warned by appellant. O'Day was master mechanic, and had charge of the employes who were subject to his orders and were bound to obey and conform to such orders. On January 1, 1903, O'Day ordered appellee to take a piece of iron to an emery-wheel and grind off the ends, which order appellee was bound to conform to and obey, and which he did obey, and was complying with such order and was using due care and diligence when injured. Small pieces of iron or steel or material were thrown from the wheel, striking appellee in the eye, causing the same to inflame, from which injury the eye was destroyed. The injury would not have occurred if the wheel had been properly guarded, or had been properly provided with an exhaust-fan sufficient to carry off particles of dust and material from the wheel. It was practicable to operate the emery-wheel with a properly constructed hood or shield or other protection, and to provide the same with a proper exhaust-fan or other sufficient device to carry off the dust and particles set free from the operation of the wheel, without materially interfering with its operation and usefulness, so that the injury would have been avoided. The jury further answered that appellee was not a machinist but was a mechanic. John Kennedy was general superin-

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tendent of appellant's entire plant during all the time appellee worked there. Appellee had had some experience in repairing machinery before he went to work for appellant. The work carried on in appellant's machine-shop was the building of new machinery and the repairing of old. Appellee worked some part of this time in the black ash room at the factory. Appellee's eyes had not been weak or sore before he went to work for appellant. He did no work on the "shaper," which required close attention to see the lines. Appellee's eye was injured on January 1, 1903, at 9 o'clock in the morning. He had worked every day from November 10, 1902, until he was hurt. Appellee made no objections when sent to change the valves in the engines, and none when sent to help move some steam pumps. John O'Day, the master mechanic, directed appellee to work in the machine-shop. On the day he was injured he continued to work at the mill until night, and did not have his injured eye bandaged and did not see a doctor. On the evening of his injury appellee had his eye bandaged when at the table. That evening he went to see a doctor about the eye. Next day, January 2, 1903, appellee returned to work at appellant's mill, and worked until 2 o'clock p. m. After appellee's eye was taken out he worked with the machinery at appellant's factory for about three months from February 2, 1903. Appellee worked as an engineer sometime while he was employed by appellant. Before appellee was hurt there were three emery-wheels at appellant's machine-shop, two of them were operated on the same mandril. The wheel at which appellee was hurt was twelve inches thick and two inches in diameter, was used for grinding iron and steel, and was operated by steam. The emery-wheel at which appellee was hurt was composed of coarse emery. When hurt appellee was grinding a piece of iron seven inches long, one and one-fourth inches wide and five-eighths of an inch thick. When said emery-wheel was in operation

it revolved toward the person operating the wheel, and when iron was being ground thereon small particles of iron and dust were thrown off the wheel in the direction of the person operating it. These particles were not thrown to the side of the wheel. A person could not stand at the side and operate it. When appellee was hurt the emery-wheel at which he was operating was making 1,000 revolutions per minute, which was an ordinary and safe rate of speed for an emery-wheel of that size. Prior to his injury appellant had ground iron at the emery-wheel where he was injured four or five times, for five or ten minutes at a time. At these times sparks, dust and fine particles flew off the wheel, but appellee did not know there was any danger of his eyes being injured by them. On January 1, 1903, appellant, Muncie Pulp Company, was a manufacturing corporation. Said emery-wheel was out of repair in not being properly guarded. John O'Day directed appellee to grind the iron. No other person had anything to do with directing him to do this work. John O'Day was subject to the orders of John Kennedy; general superintendent, and said Kennedy did not directly order appellee to grind this piece of iron that he was grinding when injured. Appellee had been working at the emery-wheel twenty minutes on the day of his injury. Appellee had started to round off the corners of this piece of iron with a file, and was directed by O'Day to round off the corners on the emery-wheel. After appellee's eye was taken out he worked for appellant in and around the machine-shop for three months, and ran and operated some sort of machines, and received the same wages then as before he was hurt. The doctor who first examined appellee's eye found three small particles in it. The particle imbedded deepest in appellee's eye was emery. Appellee's eye could not have been saved by proper treatment. Appellee's eye did not become ulcerated by reason of some infectious disease, but it did become ulcerated, and said ulceration was due to infec-

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tion caused by microbes in the wound or injury in the eye. The taking out of appellee's eye was rendered necessary by the infection of the wound. Before his eye was hurt appellee received \$70 a month from appellant, and since said time he has operated an engine in the oil fields for \$60 per month. When the emery-wheel at which appellee was injured was being used to grind large pieces of iron, the sparks flying off from said wheel could be seen from nearly any place in the machine-shop. Since receiving his injury appellee has also worked for Kirby & Hutzel. When large pieces of iron were being ground on the wheel at which plaintiff says he was hurt a rim of sparks followed around the wheel. The ulceration of the wound in appellee's eye, due to infection, necessitated the removal of his eye. In grinding iron on the emery-wheel the particles of iron thrown off in the grinding process are red hot when thrown off. The jury allowed appellee \$146.75 for medical services, and \$178.75 for other expenses connected with the removal and treatment of his eye. They allowed him nothing for the probable shortening of his life by reason of such injury.

It is difficult to tell by the complaint upon what theory the pleader was intending to proceed, nor is it, from the answers given to interrogatories, entirely plain

1. upon what theory the case was submitted to the jury. But we think the complaint states a cause of action under the factory act. That statute (§7087i Burns 1901, Acts 1899, p. 231, §9) provides: "All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded. * * * Exhaust-fans of sufficient power shall be provided for the purpose of carrying off dust from emery-wheels and grindstones, and dust-creating machinery from establishments where used."

In *Monteith v. Kokomo, etc., Co.* (1902), 159 Ind. 149, 58 L. R. A. 944, a complaint based upon the clause of this

act first-above quoted was held to state a cause of
2. action, although the pleading contains no averment that it was possible or practicable properly to guard the saw without rendering it useless for the purpose intended. But in the later case of *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, a paragraph of complaint was held insufficient for the reason, among others, that it omitted an averment of this fact; the case holding that whether the thing required by the statute to be guarded could be so guarded was not a matter of defense.

But in the case at bar it is sufficiently shown by the pleading that no exhaust-fans were provided for the emery-wheels, that without the exhaust-fans they were dangerous, and that it was practical to operate the emery-wheels with proper exhaust-fans. This clause of the above section was not under consideration in either *Monteith v. Kokomo, etc., Co., supra*, or *Laporte Carriage Co. v. Sullender, supra*; and it would seem to be sufficient to aver that the emery-wheel was not provided with any exhaust-fan for carrying off dust therefrom. The effect of the statute is to impress upon an emery-wheel in use in a factory a characteristic of danger, and to forbid its use unless provided with an exhaust-fan. The statute imposes a specific obligation with reference to a specific thing, and the failure to comply with the requirements of the statute is a plain breach of a statutory duty owing to the employee. But, if the doctrine of the case of *Laporte Carriage Co. v. Sullender, supra*, is applied to this particular clause of the statute, the pleading sufficiently avers that the emery-wheel could have been provided with an exhaust-fan without rendering it useless for the purposes intended.

It is also argued that as appellee was bound to know that there was no exhaust-fan, and from his age and experience was bound to know that iron ground on a rapidly

3. revolving emery-wheel would throw off sparks and particles, the general averment of his want of knowl-

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edge is overcome by special averments from which it is evident he must have known such fact. The following language in the opinion in *Monteith v. Kokomo, etc., Co., supra*, is applicable and controlling on this question: "In the present case, the risk existed at the time the appellant entered the employment. Whatever it was, whether great or slight, obvious or otherwise, it resulted from the failure of the employer properly to guard the saw. But we can not say, as a matter of law, that the use of the saw without a guard appeared to the appellant to be necessarily dangerous. The position of the saw, and the manner in which it was to be used, may have seemed reasonably safe. There is nothing in the complaint to show that the appellant had any cause to think the saw dangerous. The complaint does not allege that the appellant had no knowledge of the fact that the saw was not guarded, or that he did not see and comprehend such danger as arose from its condition. And in an action upon section nine of this statute, this averment was not necessary." See, also, *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413.

Upon the motion for judgment on the answers to interrogatories it is argued that the answers show that it was not dust from the emery-wheel that caused the in-

4. jury, but that the injury was caused by pieces of iron or steel or material thrown off from the wheel, while the statute requires fans to carry away dust, and that therefore the injury was not occasioned by the absence of fans. As it might be difficult, if not impossible, to tell how small a piece of metal should be before it would properly be called dust, we could not say as matter of law that the fans required by statute were not intended to carry away any particles of metal, resulting from the use of the wheels, large enough to cause injury if they should strike the eye.

Upon the motion for a new trial complaint is first made of the fourth instruction, which reads as follows: "If the

jury believe from the evidence that the plaintiff
5. received his alleged injury, while in the employ
and service of the defendant in the manner alleged
in the complaint, on January 1, 1903, while rounding off
the rough edges of a piece of iron or steel on the defend-
ant's emery-wheel, operated in the defendant's machine-
shop of its manufacturing establishment, in obedience to
the order or direction of the defendant's master mechanic,
under whose orders and directions plaintiff was then and
there working for the defendant, and who had then and
there authority from the defendant to order and direct
him, and that the defendant then and there failed, neg-
lected and omitted properly to guard its said emery-wheel,
or cause the same to be properly guarded by any hood,
shield, protection or device, or guard of any kind, and
failed, neglected and omitted to provide any device or pro-
tection for shielding or protecting the eyes of its employes
and servants working at and required to work at said
emery-wheel, and failed, neglected and omitted to provide
any exhaust-fan or other device to carry off the dust and
particles set free from the operation of said emery-wheel,
as alleged in the complaint, and that it was then and there
practicable properly to guard said emery-wheel and pro-
vide the same with an exhaust-fan or other device to carry
off the dust and particles set free from the operation of
such emery-wheel, and that said emery-wheel was part of
the machinery in the defendant's said manufacturing estab-
lishment, then and there operated and used therein as
alleged in the complaint, such failure, neglect and omis-
sion on the part of the defendant would be negligence, and
the plaintiff would not assume the risk arising from such
negligence; and if the same approximately resulted in and
caused the injury to plaintiff's eye, as alleged in the com-
plaint, the plaintiff is entitled to recover, and your verdict
should be for the plaintiff, unless you should find that it
has been proved by a fair preponderance of the evidence

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that the plaintiff was guilty of contributory negligence on his part which contributed to cause his said injury.”

Appellee, in his complaint, alleged, among other acts of negligence, that appellant had failed properly to guard its emery-wheels, and that it had failed to provide any protection for the eyes of employes who were required to operate the wheels, and that it had failed to provide exhaust-fans. If the above instruction required appellee to establish by evidence more than was necessary to make a case of negligence, an objection to the instruction on that ground could avail appellant nothing. That is, if it was a case where exhaust-fans should have been provided, and they were not, it was unnecessary to show negligence in any other respect. The instruction does not tell the jury that if appellant failed properly to guard the wheels, or failed to provide exhaust-fans, or failed to provide any shield or protection for the eyes of employes, that such failure would be negligence; but the instruction states that, if appellant failed in all three of the particulars named, it was guilty of negligence.

It is unnecessary, for the purpose of this instruction, to inquire whether the emery-wheel, described as it is in the complaint, with its uses and the dangers inci-

6. dent to its operation, is a machine within the meaning of that clause requiring machinery to be guarded properly, for the reason that the statute does require that emery-wheels shall be provided with exhaust-fans. And if it is necessary that the injured party should aver and prove that it was practicable to provide exhaust-fans, the complaint avers that fact, and the above instruction requires that it be proved. If the complaint states a cause of action for negligence in failing to provide exhaust-fans, the fact that it pleads, if it does so plead in fact, other separate and entirely distinct acts of negligence, did not make the pleading bad. And if the instruction requires not only that this act of negligence be proved but also that

such other separate and distinct acts shall be proved, the error, if any, is one of which appellant can not complain.

An instruction which is a statement of a general proposition, and is applicable only to a different theory from that upon which the case proceeded, should not be given;

7. but, where there was no attempt in the instruction itself to apply it to the facts of the case, the giving of such an instruction would not necessarily be reversible error.

Objection is made to the following instruction: "If you find for the plaintiff and award him damages, in fixing the amount of the same, you can not allow him

8. anything for loss or shortening of life itself; but, if you believe from the evidence that shortening of life may be the result of the injury, this may be considered in determining the extent of the injury only, and the consequent disability to make a living and the mental and bodily suffering which may result." If this instruction authorized damages for the shortening of life, it was erroneous. *Richmond Gas Co. v. Baker* (1897), 146 Ind. 600, 36 L. R. A. 683. But in that case the doctrine seems to be approved that if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury. The instruction under consideration is thus limited, and manifestly did not mislead the jury, as in an answer to an interrogatory the jury state that they allow appellee nothing for the reason that they believe the injury for which he sues will shorten his life.

In another instruction the jury were told that in estimating appellee's damages they might consider, among other things, "his pain and suffering already en-

9. dured, and that may be endured, from and by reason of his injury, in the future, if any." The general rule is that if damages are allowed for the pain and suffering which a party may hereafter endure, it must

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be such as is reasonably certain to result from the injury. The use of the word "may" is not altogether correct, but we are not prepared to say that the instruction as given necessarily permitted the jury to go into the field of probability or speculation. There was some evidence from which the jury could conclude that it was reasonably certain that pain and suffering would result from the injury. Upon the court's refusal to give certain instructions requested, it is stated in argument that if there are two ways of doing a thing, one of which is dangerous and the other safe, and a person acts upon his own volition and chooses the dangerous way, he is negligent, and can not recover. The evidence is not without conflict as to what would be the proper position for a person to occupy while operating the wheel, but there is evidence authorizing the jury's answer to an interrogatory that a person could not stand at the side of the wheel and operate it in doing the work appellee was doing when injured.

Complaint is made of other instructions given and of the court's refusal to give certain other instructions requested. But the answers of the jury to the interrogatories show that appellant was not harmed by the giving or the refusing to give such instructions.

Under such circumstances, although an erroneous instruction was given and a correct instruction refused, the error would not be ground for reversal. *Cleveland, etc., R. Co. v. Newell* (1885), 104 Ind. 264, 54 Am. Rep. 312; *Ricketts v. Harvey* (1886), 106 Ind. 564; *Cline v. Lindsey* (1887), 110 Ind. 337; *Roush v. Roush* (1900), 154 Ind. 562; *Ellis v. City of Hammond* (1901), 157 Ind. 267. Taking into consideration the answer of the jury to interrogatories it can not be said that the substantial rights of appellant were prejudiced by the giving of any instruction of which complaint is made. In *Shields v. State* (1897), 149 Ind. 395, 406, the court said: "It is settled

law in this State that instructions are considered with reference to each other, and as an entirety, and not separately or in dissected parts; and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some portion of an instruction, standing alone or taken abstractly, and not explained or qualified by others, may be erroneous, it will afford no grounds for reversal. * * * Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they result in no substantial harm to the defendant, if the instructions, taken together, correctly state the law applicable to the facts of the case. * * * Nor is the giving of an erroneous instruction reversible error when it appears that the substantial rights of the defendant were not prejudiced thereby. * * * The foregoing rules apply to criminal as well as civil cases."

Applying the foregoing rules to the case at bar it can not be said that any reversible error was committed by the trial court in the instructions to the jury.

Judgment affirmed.

GREGG v. GREGG.

[No. 5,445. Filed October 24, 1905. Rehearing denied January 25, 1906.]

1. HUSBAND AND WIFE.—*Alienation.—Action for, by Wife.*—A married woman has a right of action against any person who alienates her husband's affections. p. 215.
2. SAME.—*Alienation.—Basis of Action for.*—The basis of an action by the wife for the alienation of her husband's affections is the loss of *consortium*, separation being unnecessary. p. 216.
3. PLEADING.—*Complaint.—Alienation.—Malice.*—In an action by a wife against her mother-in-law for the alienation of the affections of such wife's husband, her complaint must show malice on the part of such mother-in-law, the presumption being that her acts were for the best interests of her child. p. 217.

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4. **DAMAGES.**—*Punitive.—Alienation.*—Exemplary or punitive damages may be given in an action for the alienation of the affections of husband or wife. p. 217.
5. **JUDGMENT.**—*Motions in Arrest.—Amended Complaint.—Appeal and Error.*—Where an amendment of the complaint is permitted after a motion for a new trial is overruled, a motion in arrest filed thereafter will be considered on appeal as directed to the amended complaint. p. 217.
6. **PLEADING.**—*Complaint.—Amendments.*—Where an amendment, asked after the overruling of a motion for a new trial, does not materially change the issues, it should be allowed. p. 218.
7. **HUSBAND AND WIFE.**—*Alienation.—Affections.—Presumptions.—Burden of Proof.*—The presumption is that the husband has affection for his wife, and the burden is on defendant, in a case of alienation, to prove the contrary. p. 218.
8. **PLEADING.**—*Complaint.—Alienation.—Initial Attack After Verdict.*—Where the initial attack on a complaint for alienation is made after verdict, such complaint alleging that the wife was compelled to leave the husband on account of cruel and inhuman treatment, but not setting out specific acts thereof, the presumption obtains that proof of such acts was given on the trial. p. 219.
9. **APPEAL AND ERROR.**—*Appellate Court Rules.—Briefs.*—A failure by appellant to set out in her brief the portions of the record questioned, together with her failure to set out propositions or points, as required by Appellate Court rule 22, is a waiver of such alleged errors. p. 219.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by June J. Gregg against Sarah M. Gregg. From a judgment on a verdict for plaintiff for \$3,000, defendant appeals. *Affirmed.*

M. W. Bruner and *Whittington & Whittington*, for appellant.

Crane & McCabe, for appellee.

BLACK, J.—The appellee, June J. Gregg, sued the appellant, her mother-in-law, Sarah M. Gregg, to recover damages for the alienation by the appellant of the affections of the appellee's husband, George M. Gregg. The complaint was in one paragraph, to which the appellant

answered by the general denial. After trial by jury and verdict for the appellee, and after the overruling of the appellant's motion for a new trial, the appellee filed a motion for leave to amend the complaint. On the same day the appellant filed her motion in arrest of judgment. The court sustained the appellee's motion to amend, and the appellee amended the complaint as asked in her motion, and the court overruled the motion in arrest, and rendered judgment upon the verdict.

The appellant has assigned error in sustaining the motion to amend the complaint and error in overruling the motion in arrest of judgment. She has also assigned that the complaint does not state facts sufficient to constitute a cause of action against her.

In the complaint it was alleged that the appellee, November 16, 1898, at the residence of her father, in Kentucky, intermarried with George M. Gregg; that they lived together as husband and wife until June 15, 1901, when she was compelled to, and did, leave him, on account of his cruel and inhuman treatment of her, as in a subsequent part of the complaint more fully alleged; that he is the only child of the appellant and her husband, deceased in 1900; that at the time the appellee and George M. Gregg were married he was twenty-five years of age, and was then, and all his life had been, living with his father and mother at their home, as a member of the family, in the city of Crawfordsville, Indiana, where these parents had resided for more than twenty years, and they each possessed considerable real and personal estate; that the appellant owned a valuable farm, worth \$15,000, in Montgomery county, and other real and personal property, and appellant's husband possessed a large and valuable residence in Crawfordsville, in which he and the appellant lived, and in which said son was reared; that appellant's husband also owned a valuable business block in that city, and other valuable real estate and considerable personal estate, and

the appellant and her husband were able to live, and did live, comfortably solely from the income of their respective estates, and they brought up their said son with his every want and wish gratified by them, and with the understanding and notion that they had abundant income and means to support him and furnish all his wants and gratify all his desires, and that it was not and would not be necessary for him to work and earn his own living, but that his father and the appellant would supply him with all the necessities and luxuries of life out of their incomes and property; that these parents were informed and knew that their son intended to marry the appellee, and they prepared rooms in their residence to which the appellee should be brought, and in which she and her husband should live when they were married; that immediately upon their marriage George brought the appellee, with the full knowledge and consent of his parents, to their home, and to the rooms so prepared for them; that George had no property or estate of his own, and depended solely upon his father and the appellant for his support and for means to provide himself and the appellee with a home, board, clothing and support and provisions suitable for the condition in which they lived, and in which George had been brought up; that the appellee and her said husband lived pleasantly and happily together in said home for several months.

The means alleged to have been unlawfully, falsely and maliciously employed by the appellant for the purpose of separating her son from the appellee, and of alienating his affections from her, are set forth at length, being means adapted to such a purpose. It is alleged that all the unlawful, false and malicious statements, declarations and reports before set forth were often repeated and stated by the appellant to appellee's husband, and that, gradually induced by said false, malicious and wrongful statements, language and conduct of the appellant, the appellee's husband's affections for the appellee began to grow cold, and

he became indifferent to her, and finally ceased to have any love or affection for her whatever, and he began to neglect her and then to treat her cruelly and inhumanly, and the appellee lost the love and affection of her husband by and on account of the aforesaid false, wrongful and malicious reports, statements and conduct of the appellant; that gradually the conduct and treatment of her husband toward the appellee became so harsh and cruel that she was compelled to and did, June 15, 1901, separate herself from him. It was shown that the appellant had control of all the property and means of support of herself and her family, and it was alleged that thereby she had complete control over the appellee's husband. It was further alleged that at the time of appellee's separation from her husband she was with child by her husband, and that she was driven from the home of her husband, being the home of appellant, on account of and by reason of the aforesaid treatment of her husband instigated and procured by the appellant, and afterward, December 25, 1901, a son was born to appellee; that December 12, 1902, the appellee, on account of her husband's said cruel and inhuman treatment of her, obtained a divorce from him by the judgment of the Clinton Circuit Court, and she had been living separate and apart from said George M. Gregg ever since June 15, 1901; "that said George M. Gregg, at the time he married this plaintiff, had great love and affection for her, and he continued to have love and affection for this plaintiff as his wife until the same was lost to and alienated from her by the aforesaid acts, conduct and language of the defendant, and that thereby and through said acts, conduct and language of the defendant plaintiff has lost the love, affection, care, support, society and help of her said husband." The averments last-above quoted were added to the complaint by the amendment permitted by the court as above stated. It was further alleged that during all her married life, and up to the time she was compelled to

separate herself from her husband, the appellee was a loving, dutiful and faithful wife, and that but for the aforesaid false, wrongful and malicious reports, statements and conduct of the appellant they would yet be living together. Alleging that she had been damaged in a certain sum, the appellee demanded judgment for that amount.

In *Logan v. Logan* (1881), 77 Ind. 558, it was held by a divided court that an action could not be maintained by a wife against her husband's father for damages,

1. because by persuasion, promises and threats the defendant induced the plaintiff's husband to abandon her, whereby she lost her husband's company, care and support. In *Postlewaite v. Postlewaite* (1891), 1 Ind. App. 473, this court, while earnestly suggesting the right of a married woman to maintain such an action, was not required by the case before it to go further than to hold, as it did, that where the wife had been divorced her right to maintain the action could not be denied. In *Haynes v. Nowlin* (1891), 129 Ind. 581, 14 L. R. A. 787, 28 Am. St. 213, while not affirmatively and positively overruling *Logan v. Logan*, *supra*, it was shown that the reason why formerly the wife could not maintain such an action was not that she was not the source of the substantive right, which the best expositions of the common law recognize as possessed by her, but was, in truth, the lack of remedy available to her at common law because of the strict application of the maxim that husband and wife are one; and it was held that under the modern statutes relating to the rights of married women, the right of the injured wife to maintain the action now certainly exists against one who wrongfully entices her husband and alienates his affections. In the opinion of the court it was said that there is no clearer right than that of the wife to her husband's "support, society and affection," and that when the statutes gave a married woman the right to sue alone, and changed her status so as to invest her with the general property

rights of a citizen, and to impose upon her almost the same obligations as those relating to all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who has tortiously wrested from her "the support, society and affections" of the husband; and the court inserted in the opinion delivered a quotation from 1 Bishop, Marriage, Div. and Sep., §1358, in part as follows: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society, and especially also of his protection and support, inflicts on her a wrong in its nature actionable." See, also, *Wolf v. Wolf* (1892), 130 Ind. 599.

An action by a husband for wrongful alienation of his wife's affections is based on the loss of the *consortium*—that is the society, companionship, conjugal affection, fellowship and assistance. It is not necessary that there be separation of the husband and wife, or that the latter be debauched by the defendant, or that there be actual pecuniary loss. The loss of services may constitute one of the elements of damages, but such loss is not necessary to the maintenance of the action. *Adams v. Main* (1891), 3 Ind. App. 232, 50 Am. St. 266. So the wife may sue another than her husband for the loss of the *consortium*, and may recover for having been wrongfully deprived by the defendant of the society, companionship, affection and protection of her husband. *Adams v. Main, supra*. The loss suffered by the wife, redressible by such an action, may differ from those sustained by a husband whose wife has been wrongfully enticed away from him, but whatever be her losses, consequent upon the wrongful alienation of her husband's affection, if of such character that damages therefor are assessable by a jury, such damages should be recoverable. See *Holmes v. Holmes* (1893), 133 Ind. 386. And while a distinction

is observable between a case wherein the defendant
 3. is a stranger and one wherein the defendant is the parent of the husband or the wife of the plaintiff, and the right of the defendant so related to give advice and shelter and protection to his or her own child is recognized (*Huling v. Huling* [1889], 32 Ill. App. 519), yet such relationship only serves as a foundation on which to build the defense that there was no wrongful enticement or persuasion resulting in the alienation and desertion and consequent loss which forms the basis of the action. The complaint in such an action against the parent must aver that the acts charged against the defendant were maliciously done; the presumption being that the parent will act for the best interest of the child. *Reed v. Reed* (1893), 6 Ind. App. 317, 51 Am. St. 310. See, also, *Railsback v. Railsback* (1895), 12 Ind. App. 659. The actionable offense

4. of the defendant in such a case not being punishable through criminal procedure, exemplary damages may be awarded in the discretion of the jury, acting without passion, partiality or fraud. *Waldron v. Waldron* (1890), 45 Fed. 315; *Lockwood v. Lockwood* (1897), 67 Minn. 476, 493, 70 N. W. 784. We agree that, as the right of the wife to the conjugal affection and society of her husband is not different in kind, degree or value from the corresponding right of the husband, therefore, since the obstruction to her remedy, because of antiquated forms of proceeding, has been removed, though the marriage relation be not dissolved, she should have like remedy to recover for whatever substantial injury she may suffer. See *Foot v. Card* (1889), 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. 258; *Lockwood v. Lockwood, supra*.

Objections against the complaint, urged here as having been raised by the motion in arrest or by the assignment of the insufficiency of the complaint in the assignment of errors, must be regarded as directed to the complaint as amended after verdict. Concerning

the action of the court in permitting the amendment, it seems sufficient to show that it did not materially affect the issue tried. The complaint, as originally drawn,

6. showed that the appellant's son, of full age, married the appellee in another state, with the knowledge of his parents, and with their knowledge and consent brought her home to their residence, where rooms had been prepared by his parents for the use of the appellee and her husband, and that they lived there pleasantly and happily for some time; that a son was born to them after their separation; that the appellant, for the purpose of unlawfully causing the separation of the appellee from her husband and of alienating his affections from her, maliciously used means, described, adapted to such an end, and that, gradually induced by these means, her husband's affections for her began to grow cold, and he became indifferent to her, and finally ceased to have any love or affection for her, and he began to neglect her and then to treat her cruelly and inhumanly, and she lost the love and affection of her husband by and on account of the described conduct of the appellant; that gradually the conduct and treatment of her husband toward her became so harsh and cruel that she was compelled to separate herself from him, and did so, and she was driven from her husband's home by reason of this treatment of her husband, instigated and procured by the appellant; that during all her married life, until she was compelled to separate herself from her husband, she was a loving, dutiful and faithful wife. It did not materially change this complaint to add, by way of amendment, an averment that at the time her hus-

7. band married the appellee he had great love and affection for her, and that he continued to have love and affection for her as his wife until lost and alienated by the acts of the appellant. Certainly, the law will not presume that, under such circumstances as those shown by the complaint without the amendment, the man did not

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have conjugal affection for his wife. Indeed, the law indulges a presumption generally that a husband has such affection, and it rests with the defense in such a case as this to prove the contrary. *Bailey v. Bailey* (1895), 94 Iowa 598, 602, 63 N. W. 341.

In *Jonas v. Hirshburg* (1897), 18 Ind. App. 581, it was held that in a complaint for alienating the affections of the plaintiff's wife it was not necessary to allege that the husband and wife were living together peaceably and happily, facts to the contrary being matter of defense.

It is claimed on behalf of the appellant that it appears from the complaint that the husband did not leave the wife, but that she left him; that the complaint does not

8. state any fact that would constitute harsh and cruel treatment; that she should be regarded under the allegations of the pleading as having voluntarily left him; and that the only thing she lost by the conduct of the appellant was the love and affection of her husband. We need not discuss the question whether the loss of the husband's love and affection through such means would furnish a ground of action. It seems sufficient to say, with reference to this objection, that whatever might be the proper view to be taken of the complaint in this respect upon demurrer or upon motion to make the complaint more specific, the pleading is now to be considered as one attacked for the first time after verdict, and it may well be assumed that conduct constituting cruel treatment on the part of the husband was sufficiently proved on the trial.

The appellant's motion for a new trial was overruled. As to the reasons assigned in this motion, we must recognize the objection of the appellee to the brief of

9. the appellant, which plainly fails to comply with the rule of this court concerning such briefs, in that, with relation to this motion, the brief does not contain such concise statement of portions of the record as the rule requires, and, following such statement, under a

separate heading of each error of the court below in this connection relied on, separately numbered propositions or points, stated concisely and without argument or elaboration. Unless this court would contravene its own rule, the enforcement of which is invoked by the appellee, and would itself perform the work of attorneys, we can not consider the reasons for a new trial. The requirements of the rule are not obscure, and reasonable compliance therewith is not a hardship. The rule has been many times explained and enforced by our decisions. Equal justice in the decision of causes requires uniformity in the application of this rule.

Judgment affirmed.

EQUITABLE TRUST COMPANY v. TORPHY ET AL.

[No. 5,546. Filed January 25, 1906.]

1. **APPEAL AND ERROR.—Right Result.—Bills and Notes.—Defective Answer.—Special Findings.**—Where plaintiff secured a judgment against one of the joint makers of a note for the whole amount due as shown in the special findings, alleged error in the court's ruling on such defendant's answer is harmless. p. 222.
2. **SAME.—Mortgages.—Foreclosure.—Partial Recovery.**—Where defendant married woman pleaded suretyship and coverture as against all of plaintiff's demand, the plaintiff has no cause for complaint because the court gave a decree for part only of plaintiff's demand, the proof showing that such defendant was liable only for such part. p. 222.
3. **SAME.—Right Result.**—Where the trial court reached the right result, its decision will be affirmed. p. 223.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Suit by the Equitable Trust Company against Susie Torphy and another. From a decree for plaintiff for part of its claim, it appeals. *Affirmed.*

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Brooks & Brooks and F. M. Trissal, for appellant.

WILEY, J.—Suit by appellant upon two notes and to foreclose a mortgage.

Appellees answered separately in one paragraph, to which separate demurrers were addressed and overruled. Reply in denial. Upon request, the court made a special finding of facts and stated its conclusions of law thereon. A decree of foreclosure was entered ordering the real estate to be sold, and the proceeds to be applied: (1) to payment of costs; (2) to satisfaction of the judgment against said Susie Torphy, and (3) the balance to be brought into court "for further order."

In view of the facts specially found, the overruling of the demurrers to the answers, if erroneous, could not prejudice the rights of appellant. The court found that appellees executed the notes in suit; that the principal note was for \$1,400, and the interest note for \$35; that to secure the payment thereof they executed a mortgage on certain real estate, describing it; that at the time of the execution of the notes and mortgage appellee Susie Torphy owned the real estate described, and still owns the same; that at said time she was and ever since has been, a married woman, the wife of her co-appellee; that there was due on said notes, principal and interest, the sum of \$1,535.12, and \$100 attorneys' fees; that appellee Susie did not make any request or statement to appellant relative to its making any loan of money in consideration of the execution of said notes and mortgage; that the only consideration received by her for the execution of the notes and mortgage was the payment by appellant of a balance of a valid mortgage indebtedness held by it against said real estate, and current and delinquent tax liens aggregating \$342.80, both of which sums were deducted by appellant from the principal sum of \$1,400; that the balance of said \$1,400 was not received by her for her own use, or for the benefit of

her estate; that there was no agreement with appellant that said balance was to be for her use or the benefit of her estate; and that said balance was received and used by her co-appellee.

Upon these findings the court stated as conclusions of law: (1) That appellant was entitled to judgment against Susie Torphy in the sum of \$382.45, principal and interest, and \$100 attorneys' fees, and foreclosure of the mortgage; (2) that appellant was entitled to judgment against appellee David Torphy in the sum of \$1,535.12. The decree directed that any payment upon the judgment against Susie Torphy should be credited upon the judgment against David Torphy.

Upon the facts found, the conclusions of law and judgment are correct. Counsel for appellant assert that the answer of appellee David does not state any "cause

1. of defense as to him against the complaint, nor against the notes sued on in the complaint." Let this be conceded, and yet appellant was not harmed by the overruling of its demurrer to it. He jointly executed the notes with his co-appellee, and was liable thereon for the full amount. The trial court awarded judgment against him for the amount due, and that is all appellant was entitled to, without reference to the facts pleaded in his answer.

The answer of appellee Susie was a plea of coverture, that she was surety for her husband, that she received no part of the consideration for the execution of the

2. notes and mortgage, and that she owned the real estate mortgaged. Appellant's objection to this answer is that it was addressed "to the entire demand sued on, and there could be on that answer no partial recovery." Appellant is not in a position to complain, because said appellee's answer, if true, was a complete bar, while the court found that she did receive a part of the consideration,

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and gave appellant all the relief, as to her, to which it was entitled.

Counsel for appellant admit in their brief that the evidence shows that appellee Susie Torphy did not receive for her own use and benefit but \$482.45 of the sum

3. loaned, and it is specifically found as a fact that her co-appellee received and used for his benefit the residue. Upon these facts the judgment is right upon the merits. By the judgment and decree the respective rights of the parties have been correctly determined. There is no "error or defect in the pleadings or proceedings" which affects the substantial rights of appellant. It appears to us that the merits of the cause, upon the facts found, have been fairly tried and determined in the court below. This being true, §§401, 670 Burns 1901, §§398, 658 R. S. 1881, forbid a reversal. It would be a waste of time to refer to cases where the Supreme Court and this Court have affirmed judgments in harmony with the mandate of the two sections of the statute cited.

Judgment affirmed.

Roby, C. J., Black, P. J., Robinson and Myers, JJ., concur. Comstock, J., absent.

ALLYN v. BURNS.

[No. 5,507. Filed January 26, 1906.]

1. TRIAL.—*Instructions.*—*Applicability of, to Pleadings and Evidence.*—Instructions requested must be shown to be applicable not only to the pleadings but also to the evidence. p. 227.
2. SAME.—*Instructions.*—*Sales.*—*Conditional.*—*Return.*—An instruction refused, that if defendant did not return a wind pumping outfit within a reasonable time his right to return same would be forfeited and the sale would be absolute, is not applicable where the evidence showed that plaintiff was to retake such outfit if, on a sixty-day trial, it did not satisfy defendant. p. 227.

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3. **SALES.—Conditional.—Notice of Rejection.**—Where plaintiff sold to defendant, on a sixty-day trial, a wind pumping outfit, and defendant within such sixty days notified plaintiff that it was unsatisfactory, no sale was perfected. p. 228.
4. **SAME.—Conditional.—Damages.—Responsibility for.**—Where plaintiff erected on June 16, a wind pumping outfit, the defendant to pay for same if satisfactory at the end of a sixty-day trial, and on August 15, defendant gave plaintiff notice that it was unsatisfactory, defendant is not liable, in the absence of wilful misconduct, for damages to such outfit occurring in December. p. 228.
5. **TRIAL.—Instructions.—How Considered.**—The court is not required to state in one instruction the complete law of the case, but if the instructions considered in their entirety fairly present the case to the jury, there is no available error. p. 229.
6. **SAME.—Instructions Refused Covered by Those Given.**—Where refused instructions are covered by those given, no error is shown. p. 231.

From Wells Circuit Court; *Edward C. Vaughn*, Judge.

Action by William R. Allyn against William F. Burns. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Todd & Gordon and Dailey, Simmons & Dailey, for appellant.

Levi Mock, John Mock and George Mock, for appellee.

MYERS, J.—Appellant instituted this action against appellee to collect the contract price for a wind pumping outfit. The cause was tried upon an amended complaint in three paragraphs. The first and second paragraphs are based upon a written order made part of each paragraph by exhibit. The order is as follows:

“Poneto, Indiana, May 23, 1902.

W. R. Allyn.

Ship to Frank Burns at Poneto.

How ship. Freight. When. At once.

Terms. Cash on sixty days trial.

1 25 ft. Tower, steel.

1 Acme Regulator.

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1 Dewey Fountain.

30 feet, 1 inch Pipe.

20 feet, 1½ inch pipe.

For Force Pump and fitting Ext.

\$75.00

W. F. Burns.

6.15

W. R. Allyn.

B. Thompson.”

The first paragraph alleges the delivery on the premises of appellee, on June 12, 1902, of all the material called for by the order, and out of said material appellant constructed for appellee a wind pumping outfit; that appellee took and retained possession of the same, used and accepted the same, after giving it sixty days trial, but has refused to pay therefor; that the contract price for said pump is past due and wholly unpaid, and judgment is demanded.

The second paragraph alleges that appellee, in writing, ordered from appellant certain materials, out of which appellant was to erect for appellee on his premises a wind pump, on sixty days' trial, and for which appellee agreed to pay appellant \$81.15; that, on June 12, 1902, pursuant to such order, appellant delivered on the premises of appellee the goods so ordered, and erected thereon a wind pump; that appellee took possession and accepted the same, after giving it sixty days trial, and thereafter used the same, for the purpose of pumping water for his live stock, until December, 1902, “when he, by himself and through his agents, pulled out the bolts that supported one side of the mill and let the same fall down, and thereby broke said mill to pieces and rendered it worthless.” Said paragraphs also aver the amount due, and appellee's failure and refusal to pay the same.

The third paragraph counts upon an indebtedness due appellant from appellee for goods and merchandise sold and delivered by appellant to appellee, to be paid for in cash on sixty days' trial, and upon the fact that appellee

accepted and used the same after sixty days' trial; it also avers the amount due, and appellee's refusal to pay the same.

Appellee answered this complaint in two paragraphs. The first, a general denial, and the second alleges that the contract mentioned in the complaint was a parol contract; that by the terms of the contract appellant agreed to erect a wind pump on the premises of appellee out of the material mentioned in the written order filed with the complaint; that after sixty days' trial of said pumping outfit—the same being satisfactory to appellee—he was to pay for the same; that by said agreement appellant was to erect a tower twenty-five feet high, also a fourteen-barrel tank; that the derrick should be good and substantial; that a good pump should be furnished, one with sufficient capacity to furnish water for the stock of appellee; that appellee knew and was shown the place where the pump was to be erected; that the water-pipe was to be placed under ground; that the pumping outfit was to be in all respects equipped and work as well as a pump owned by one Stahl, which was known both to appellant and appellee at the time the agreement was made; that appellee had no knowledge of wind pumps; that appellant, in violation of his agreement, (1) erected a tower only twenty-one feet high, (2) erected a tank the capacity of which was only eleven barrels, (3) erected a derrick which was slender, inferior, unsubstantial and worthless, (4) furnished a pump which was inferior and worthless, (5) furnished a pump which was not of sufficient capacity to supply water for the stock of appellee, (6) laid the water-pipe above ground. Appellee further alleges that he gave the pumping outfit an honest and fair trial, and was not satisfied therewith, and never accepted the same; that on August 15, 1902, he notified appellant in writing and verbally that he would not accept the pumping outfit, that it was not satisfactory, and ordered him to remove the same from his premises, as he had

agreed to do; that appellant failed to remove the same. To this affirmative answer appellant replied in general denial.

The issues thus formed were submitted to a jury for trial, resulting in a general verdict for appellee. Appellant thereupon filed a motion for a new trial, which the court overruled, and judgment was rendered in favor of appellee for costs.

Appellant prosecutes this appeal to this court, and assigns as error the overruling of his motion for a new trial.

(1) Appellant by his assignment of errors presents for review the ruling of the court in refusing to give certain instructions by him requested, and the action of the

1. court in giving to the jury certain instructions which he insists are erroneous. Instruction number seven, tendered and refused, reads as follows: "I instruct you that where a sale of machinery is made reserving to the buyer the right to return the property if it does not prove satisfactory, or is worthless as a pumping outfit, if the buyer retains the property and fails to return it within a reasonable time, the right to return is thereby forfeited, and the sale becomes absolute like any other sale." Appellant insists that this instruction is relative to the first paragraph of his complaint, and for that reason should have been given. Because the instruction was relative to some paragraph of the complaint is not alone sufficient to warrant the court in submitting it to the jury; for, without some evidence to which it was pertinent relative to such issuable facts, there would be a lack of one of the essential elements necessary to its support. *Indiana R. Co. v. Maurer* (1903), 160 Ind. 25; *Abbitt v. Lake Erie, etc., R. Co.* (1898), 150 Ind. 498; *Price v. Lonn* (1903), 31 Ind. App. 379.

This instruction places the duty on the buyer to return the property within a reasonable time if it should not prove satisfactory. From the evidence it appears that

2. Ernest Thompson acted for appellant in making the contract with appellee, and from his testimony

on the subject we take the following: "I said that, in the event the mill did not equal or was better than the best, Mr. Allyn should take it down and take it away at his own expense." Appellee testified that "He [Thompson] was to put that mill up there on sixty days' trial, and at the expiration of sixty days, if I was not satisfied with it, they were to remove it at their own expense." On the question of whose duty it was to return the mill in case it did not prove satisfactory to appellee, we have not been referred to any other evidence than that above given. Nor do we find any other in the record. Therefore, as the instruction requested was not pertinent to the evidence, the court did not err in refusing to give it.

The contract proved gave the proposed buyer sixty days within which to make a decision to keep or reject the property, and a notice by him to the seller of such de-

3. cision within that time was sufficient. The buyer was compelled to act within that time if he declined to take it. The time being fixed, it was not a question of reasonable time, and therefore for this additional reason the instruction was properly refused. *Hickman v. Shimp* (1885), 109 Pa. St. 16; *Tiedeman, Sales*, §213.

(2) Instructions numbered nine, ten and eleven, requested by appellant and refused by the court, are to the effect that where goods are purchased on approval

4. and the same are materially damaged while in the possession of the proposed buyer, the sale becomes absolute, and the buyer's right to reject the goods is lost. If there was any evidence in the record which would tend to bring this cause within that line of cases called "sale or return," then these instructions might be germane to the case at hand, but from the evidence heretofore quoted, and the further undisputed evidence that the mill was erected on appellee's premises June 16, 1902, that the damage complained of was caused by the mill's falling down sometime in the month of December thereafter, that appellant

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on August 15, 1902, and within the sixty days allowed for trial gave appellant notice, both verbally and in writing, that the mill was not satisfactory, that it was worthless, that he would not pay for it, and requested appellant to remove the same from his premises, warrants the conclusion that this case is within the class designated by the books as a "sale on trial," or "a sale upon condition precedent;" and, this being true, it follows that appellee could only be held liable for the loss or damage to the property caused by his negligence during the time it was in his possession on trial. Loss from any other cause would fall on the vendor, the title being in him. Tiedeman, Sales, §213. In the case at bar the damage to the mill occurred more than three months after the end of the time given for trial, and more than three months after notice by appellee to appellant to remove it. True, appellee permitted the mill to remain on his premises after the time allowed for trial, but mere acquiescence alone is not sufficient under the facts proved to impute to appellee an acceptance of the mill or any liability to pay for the same, in the absence of any evidence tending to prove a wilful purpose to cause the injury. There was no error in refusing the instructions.

(3) Appellant contends that instructions numbered three, five, seven, eight and eleven, given to the jury at the request of appellee, were erroneous; that the first

5. four should not have been given, for the reason that each omits "from the consideration of the jury the inference that might be drawn from the exercise of dominion over the mill and pump by the defendant inconsistent with ownership in the plaintiff and consistent only with title, as well as possession in itself, after the expiration of the sixty days given for the trial of the property," and that number eleven is defective and erroneous because it does not inform the jury as to the effect of the continued use of the mill after the expiration of sixty days' trial, with knowledge of its imperfections, if they existed, and because

it gave no direction as to the effect of damage to the property while in appellee's possession. The trial court is not required to give all the law applicable to the case in hand in one instruction. But, in the consideration of the instructions given the jury, they are to be considered as "an entirety, and not separately or in dissected parts," and when so considered if they state the law correctly, it can not be said that the jury was misled, although a particular instruction when standing alone and unexplained and unmodified by others may be erroneous. *Shields v. State* (1897), 149 Ind. 395; *Citizens St. R. Co. v. Hamer* (1902), 29 Ind. App. 426.

The court on its own motion, by instruction number one, told the jury that "if the defendant, after giving notice that he would not accept the windmill, still continued to use the same, with full knowledge of its defects and imperfections, if it was defective or imperfect, such use would amount to an acceptance. However, you are to determine from all the evidence whether the defendant did or did not use said windmill after he served notice that he would not accept the same." Also by instructions five and six, tendered by appellant and given by the court, the jury were instructed that if they found from the evidence that after the expiration of sixty days' trial appellee continued to use the windmill and pump in watering his live stock, with knowledge of the imperfections of the mill and pump, such continued use of the same "would constitute an unequivocal act of acceptance thereof, and he would be bound to pay for the same the amount of the contract price agreed upon," that an acceptance by the buyer was absolutely binding and conclusive upon him, and that the continued use of the mill and pump "after the expiration of the sixty days provided for in the contract would constitute an acceptance of the property, which no mere words could qualify."

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These instructions clearly informed the jury as to the legal effect of appellee's use of the mill and pump after the expiration of the time for trial, as well as the

6. force and effect of an acceptance of the mill, and left it to the jury to determine the fact. Construing these instructions with the instructions claimed to be erroneous, we can not see how the jury could have been misled by reason of any objections pointed out in the instructions now under consideration. The criticisms offered against these instructions are in reality that they are incomplete; yet, if this be true, we would not be at liberty to reverse the judgment on that account, because it fully appears from the other instructions given that these defects, if any, were fully cured. *Johnson v. Gebbauer* (1902), 159 Ind. 271; *Aspy v. Botkins* (1903), 160 Ind. 170; *Chicago, etc., R. Co. v. Spilker*, (1893), 134 Ind. 380; *Mendenhall v. Stewart* (1897), 18 Ind. App. 262; *Lake Erie, etc., R. Co. v. McHenry* (1894), 10 Ind. App. 525.

After a careful consideration of the record in the case at bar we find no available error. Judgment affirmed.

FUNK, TREASURER, v. STATE, EX REL. BAKER.

[No. 5,530. Filed January 26, 1906.]

APPEAL AND ERROR.—*Appellate Court.*—*Jurisdiction.*—*Transfer.*—The Appellate Court has no jurisdiction to determine a mandamus case, and such a cause will be transferred to the Supreme Court.

From Allen Circuit Court; *James C. Branyan*, Special Judge.

Action by the State of Indiana, on the relation of Cain Baker, against Jacob Funk as county treasurer of Allen county. From a judgment for plaintiff, defendant appeals. (On transfer, see 166 Ind. 455). *Transferred to Supreme Court.*

W. & E. Leonard, R. B. Dreibelbiss and E. V. Harris, for appellant.

John H. Aiken and Frank J. Belot, for appellee.

ROBINSON, J.—Appellee brought this action on an order issued by the auditor of the county on appellant for the payment of \$50 and damages. The prayer of the petition is that an alternative writ may issue commanding appellant to pay the warrant, or show cause why the same should not be done, and that on final hearing a peremptory writ may be issued. The alternative writ was issued. A demurrer to the affidavit, motion and alternative writ was overruled, and appellant answered in four paragraphs. A demurrer to the second, third and fourth paragraphs of answer was sustained. The first paragraph of answer was withdrawn, and, appellant refusing to plead further, the court found for appellee. It was adjudged by the court upon appellant's refusal to plead further that a peremptory writ of mandate issue to appellant commanding him to pay to the relator the warrant issued, which warrant is set out in full, and it was further adjudged by the court that the relator recover the sum of one cent as damages, besides his costs, to which judgment and the rendition thereof the appellant excepted and prayed an appeal.

As this is an action of mandate, the jurisdiction on appeal is in the Supreme Court. The case is, therefore, transferred to the Supreme Court.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. COLL.

[No. 5,571. Filed January 31, 1906.]

1. RAILROADS.—*Tickets.*—*Contracts.*—*Validity.*—A provision in a railroad ticket that such ticket shall not be good for the return trip unless the holder satisfies the agent of the issuing company that he was the original purchaser, is valid and enforceable, but the passenger's right to transportation is not affected by an arbitrary refusal of such agent to be satisfied. p. 236.
2. SAME. — *Tickets.* — *Identification.* — *Contracts.* — Where the holder of a railroad ticket, providing that the holder shall sat-

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isfy the issuing company's agent that he was the original purchaser, by writing his name or by other means, fails to satisfy such agent by writing his name, he has the right to identify himself otherwise. p. 236.

3. PLEADING.—*Complaint.*—*Railroads.*—*Tickets.*—*Wrongful Refusal to Honor.*—*Torts.*—*Contracts.*—An action by a passenger on account of the defendant railroad company's wrongful refusal to honor his ticket and his consequent expulsion from the station because he could not "satisfy" defendant's agent that he was the original purchaser thereof, sounds in tort, and not in contract. p. 237.
4. TRIAL.—*Interrogatories to Jury.*—*Railroads.*—*Wrongful Refusal to Honor Ticket.*—Answers to the interrogatories to the jury, that plaintiff offered to the agent of the issuing railroad company identification that he was the original purchaser of his ticket only by his signature, do not control a general verdict for plaintiff, where plaintiff was prevented by such agent from offering further means of identification. p. 238.
5. DAMAGES. — *Excessive.* — *Railroads.* — *Wrongful Refusal to Honor Ticket.*—Where defendant railroad company wrongfully refused to honor plaintiff's ticket and by reason thereof he was forcibly and roughly expelled from defendant's station and threatened with arrest in the presence of a great number of people, a verdict for \$2,000 is excessive, there being no injury to health or loss from business. p. 238.

From Clark Circuit Court; *James K. Marsh*, Judge.

Action by Bernard A. Coll against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

M. Z. Stannard, for appellant.

James W. Fortune, for appellee.

WILEY, J.—From a judgment below against it appellant prosecutes this appeal, and by its assignment of errors it is entitled to have considered and reviewed the action of the trial court (1) in overruling its demurrer to the complaint; (2) in overruling its motion for judgment on the answers to interrogatories; and (3) in overruling its motion for a new trial.

The nature of the action will clearly appear from a statement of the facts pleaded in the complaint. It is

averred that on September 21, 1903, appellee purchased of appellant at its ticket office in the city of Jeffersonville, Indiana, a special excursion ticket to the city of Indianapolis and return; that he paid for it \$4.35, which was the regular price; and that before taking passage, in the presence of appellant's ticket agent and at his request, he indorsed his name on said ticket as follows: "B. A. Coll;" that he thereupon boarded one of appellant's regular trains and took passage to Indianapolis; that he tendered to the conductor said ticket, who detached the return coupon therefrom, and returned it to appellee; that on the following day, and before the expiration of the time limit of said return coupon, he presented the same to appellant's ticket agent at Indianapolis, as required by the terms thereof, and in the presence of such agent subscribed his name thereto in the place indicated, in the same manner and style as he had at Jeffersonville, as the original purchaser, and presented and offered it to said agent for his signature as witness to appellee's signature, as provided by the terms thereof; that said agent refused to validate said ticket by attaching his name thereto as a subscribing witness; that he refused to recognize him as the purchaser of the ticket, and declared that appellee's signature was false and a forgery, and that he was not the "B. A. Coll" who had originally purchased it; that thereupon said agent refused to validate said ticket as the ticket purchased by appellee, and marked the same on the back thereof "refused;" that appellee told said agent that he was well known to the employes of appellant operating between Jeffersonville and Indianapolis, and offered the agent proof of his identity, if he would send for some of said employes, but that said agent refused to do so; that thereupon appellee attempted to pass through the gates of said station, known as the "Union Station," for the purpose of requesting one of appellant's employes to accompany him to said agent and identify him, but that he was ejected from the car shed before he could

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secure any person to identify him, because of appellant's agent having refused to indorse said ticket as a witness, and "having written the word 'refused' across the back of the same;" that he made another effort to get in the car shed where appellant's employes were located, to get them to identify him, but was refused admission, threatened with arrest, and ejected from the entrance of the shed because said agent refused to validate said ticket; that appellee thereupon purchased a ticket for \$3.25, from Indianapolis to Jeffersonville, which he did under protest, and took the train which was about to depart for the latter place; that there were present, both at the ticket office where he tried to have his ticket validated, and at the entrance of the car sheds, "a large number of respectable persons," whose attentions were called to said controversy; that appellee is an honest and respectable citizen; that he did nothing to provoke the action of appellant's ticket agent, gatemen or employes; that he used no improper or profane language, and that by the action of said ticket agent and employes he was greatly chagrined, humiliated and annoyed, by being compelled to pay his fare and having the attention of the strangers attracted to him, to his damage, etc. He made his return coupon ticket an exhibit to his complaint, and a part thereof.

The ticket had printed upon it the following provisions:

"This ticket shall not be good for the return trip unless the holder identifies himself * * * as the original purchaser to the satisfaction of the agent of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, at station to which this ticket is sold, and when officially executed by said agent it will be good for the return trip to be commenced only on date as stamped on back and canceled under head of 'Return Date' by said agent. * * * The holder will identify himself as the original purchaser of this ticket by writing his * * * name, or by other means, if necessary, when required by conductor or agents."

Conditions of this character in railroad tickets are valid and may be enforced. The authorities are uniform upon this point. 3 Thompson, Negligence (2d ed.), §§2591,

1. 2607, 2628, 3101, 3144; 28 Am. and Eng. Ency.

Law (2d ed.), 179; 1 Fetter, Carriers of Passengers, §284; *Scott v. Central Park, etc., R. Co.* (1889), 53 Hun 414, 6 N. Y. Supp. 382; *Edwards v. Lake Shore, etc., R. Co.* (1890), 81 Mich. 364, 45 N. W. 827, 21 Am. St. 527; *Boylan v. Hot Springs R. Co.* (1889), 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290, 40 Am. & Eng. R. Cas. 666; *Mosher v. St. Louis, etc., R. Co.* (1888), 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, 34 Am. & Eng. R. Cas. 339; *Kent v. Baltimore, etc., R. Co.* (1887), 45 Ohio St. 284, 12 N. E. 798, 4 Am. St. 539, 31 Am. & Eng. R. Cas. 125; *Western Md. R. Co. v. Stocksdell* (1896), 83 Md. 245, 34 Atl. 880, 4 Am. & Eng. R. Cas. (N. S.) 510; *Abram v. Gulf, etc., R. Co.* (1892), 83 Tex. 61, 18 S. W. 321; *Dangerfield v. Atchison, etc., R. Co.* (1900), 62 Kan. 85, 61 Pac. 405; *Bethea v. Northeastern R. Co.* (1886), 26 S. C. 91, 1 S. E. 372; *Wenz v. Savannah, etc., R. Co.* (1899), 108 Ga. 290, 33 S. E. 970; *Central, etc., R. Co. v. Cannon* (1899), 106 Ga. 828, 32 S. E. 874, 14 Am. & Eng. R. Cas. (N. S.) 405; *Sinnott v. Louisville, etc., R. Co.* (1900), 104 Tenn. 233, 55 S. W. 836; *Mitchell v. Southern R. Co.* (1900), 77 Miss. 917, 27 South. 834; *Central Trust Co. v. East Tenn., etc., R. Co.* (1894), 65 Fed. 332. But the passenger's right to transportation is not affected by the arbitrary refusal of the agent to stamp and sign the ticket when requested to do so. *Missouri Pac. R. Co. v. Martino* (1893), 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W.

781. In this case so far as the complaint shows, the

2. agent refused to validate the ticket, upon the ground that the signature of appellee to the return coupon did not satisfy such agent that he was the original purchaser of the ticket. If such signature did not reasonably satisfy the agent at Indianapolis, by comparison with the

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signature witnessed by the selling agent, that appellee was the original purchaser, he had a right, under the terms of the ticket, to refuse to validate it. But his refusal under such circumstances does not necessarily relieve appellant from liability. It is shown in the complaint that appellee was able to make his identification certain by calling upon some of appellant's employes, who were within reasonable distance, and whom he could procure, if given an opportunity. This was a reasonable request, and should have been granted. He attempted to procure such persons to identify him, and the demurrer admits that he could have done so if the opportunity had been offered him. For the express purpose of procuring such person or persons to identify him at the ticket office, he made two efforts to pass through the gates at the Union Station, out to the sheds where the parties were who could have identified him, but was prevented from so doing by the agents and employes of appellant, and was ejected from the sheds. In the absence of any facts to the contrary, we must presume that this was the only additional means at his command of identifying himself "to the satisfaction" of appellant's ticket agent at Indianapolis, and, under the facts pleaded, he should have been given an opportunity to do so.

The single objection urged to the complaint is that this is an action for breach of a contract, and that it fails to show that appellee performed the conditions of that contract. We can not adopt the view that this is an action upon contract, but, on the contrary, it is one sounding in tort. Conceding that that provision in the contract, requiring appellee to identify himself to the satisfaction of the ticket agent at Indianapolis before he would be entitled to use the ticket for return passage, was a condition precedent, yet the facts pleaded fully excused him from performing such condition, in that he was prevented from doing so by appellant's agents and employes. While appellant had a legal right to require appellee to identify

himself before using the return coupon, it was under obligation to afford him a reasonable opportunity for doing so, and this it did not do. *Chicago, etc., R. Co. v. Graham* (1891), 3 Ind. App. 28, 50 Am. St. 256. The complaint was not subject to a successful attack of the demurrer.

The jury had submitted to them three interrogatories which they answered and returned with the general verdict.

Counsel for appellant admit the answers raise the

4. same question presented by the demurrer to the complaint, as they show that the only identification appellee offered to the agent that he was the original purchaser of the ticket, was by writing his name upon it. This being true, the answers are not in irreconcilable conflict with the general verdict, and the motion for judgment thereon was properly overruled.

One of the reasons assigned for a new trial is that the damages assessed are excessive. The judgment in favor of appellee was for \$2,000. The evidence shows that appellee

5. was the original purchaser of the ticket; that he used it in coming from Jeffersonville to Indianapolis; that about fifteen or twenty minutes before a regular train was to leave Indianapolis for Jeffersonville he presented himself at appellant's ticket office at the Union Station, and tendered his ticket to the ticket agent for validation; that he wrote his name on the ticket in the presence of the agent; that the agent refused to stamp and approve it, for the reason that the two signatures of appellee were not similar; that the agent demanded further evidence of his identification; that appellee informed him that he knew appellant's agents and employes who ran said train between Jeffersonville and Indianapolis, and that if he could get out in the train sheds he could get some of them to identify him; that he went to the gate leading to the sheds, exhibited his ticket to the gatetender, who advised him that it was not good; that he told the gatetender that he knew that, but wanted to go out and get the conductor, who was about fifty feet

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away, to identify him; that he got through the gate; that the gatetender called the police, and two of them grabbed him "roughly" and put him on the outside of the shed. Appellee testified that after that, as he had some little time, he went outside the station and came along the track, and "when I got up there two more policemen met me and insisted on my getting out, and said if I did not they would arrest me." He testified that he then went back to the ticket office, bought a ticket for \$3.25, and went home. There were a number of people in and about the depot, but there is not a word of evidence indicating that their attention was attracted toward appellee, by what was said and done. Appellee did not receive any bodily injury. He was put to but little inconvenience, and but small additional expense. He left Indianapolis on the train that he had intended to take, and got home at the time he expected to. Appellant's agent at Jeffersonville heard of the occurrence within a day or two, and offered to refund to appellee the amount he paid for his passage from Indianapolis to Jeffersonville, which he refused to accept. We are impressed with the view that the facts in this case fall far short of warranting so large a recovery. We are unable to understand upon what reasonable basis a judgment for \$2,000 can rest under the facts here. We fully appreciate the fact that there is no exact mathematical rule by which to calculate damages in a case of this character, but we know that there should be some reasonable basis for their admeasurement. When it appears to the mind of an appellate court, upon an examination of the evidence, that the damages assessed are so excessive and unjust that the jury in assessing them must have been influenced by prejudice, passion, or partiality, or have proceeded upon a wrong principle, a new trial will be ordered. *Eve v. Rogers* (1895), 12 Ind. App. 623; *Courtney v. Clinton* (1897), 18 Ind. App. 620; *Marsteller v. Crapp* (1878), 62 Ind. 359; *Dayton, etc., Traction Co. v. Marshall* (1905), 36 Ind. App.

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491. When considered in the light of the facts disclosed by the evidence, the amount of damages assessed is a shock to the unprejudiced mind. It thus appearing to the court that the damages are excessive, we feel that the judgment should not stand.

Counsel have discussed other questions arising under the motion for a new trial; but, in view of the conclusion we have reached, they need not be considered.

Judgment reversed, and the trial court is directed to sustain appellant's motion for a new trial.

Roby, C. J., Black, P. J., Robinson and Meyers, JJ., concur. Comstock, J., absent.

ZEIGLER v. DAILEY ET AL.

[No. 5,520. Filed January 31, 1906.]

LANDLORD AND TENANT.—Gas-and-Oil Leases.—Contracts.—Termination.—Where the landlord contracted with lessee that if no gas or oil well was completed in thirty days the grant should be void unless the lessee should pay \$143, quarterly in advance, for each year of delay, and such lessee within the thirty days paid the lessor for a certain extension of time during which he sank a well but found nothing, and removed most of the machinery, such lease became void, and the fact that the lessee entered upon such land three years later and, without the payment of such rents, or any other agreement, sank a paying well, did not revive such lease.

From Blackford Circuit Court; *John M. Smith*, Special Judge.

Suit by Michael Dailey and others against Henry C. Zeigler. From a decree for plaintiffs, defendant appeals. *Affirmed.*

Dailey, Simmons & Dailey, for appellant.

Levi Mock, John Mock, George Mock and J. A. Hindman, for appellees.

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ROBINSON, J.—On April 26, 1895, Gideon Wolf owned certain land and executed to Henry C. Zeigler the following lease:

“In consideration of the sum of \$1, the receipt of which is hereby acknowledged, Gideon Wolf, of Mansfield, Piatt county, Illinois, of the first part, hereby grants unto H. C. Zeigler, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil or gas. The first party shall have one-eighth part of all oil produced and saved from said premises, to be delivered in the pipe-line with which second party may connect his wells, namely: All that certain lot of land situate in township of Chester, county of Wells, in the State of Indiana, described as follows, to wit: [describing the 143 acres of land]. To have and hold the above premises on the following conditions: If gas only is found, in sufficient quantities to transport, second party agrees to pay first party \$100 per year for the product of each and every well so transported, and the first party to have gas free of cost to heat the stoves and light the jets in dwelling-house. Second party shall bury all oil and gas lines, where likely to interfere with cultivation, otherwise not, and pay all damages done to growing crops by reason of burying and removing said pipe-lines. In case no well is completed within thirty days from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of \$143 annually for each year such completion is delayed. A deposit to the credit of first party in any bank doing business in Montpelier, Indiana, will be good and sufficient payment for any money falling due on this grant. Payable quarterly in advance, namely, \$35.75 every three months. The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time. It is understood

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between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns."

Zeigler did not complete a well within the thirty days, but paid Wolf \$107.25 for an extension of time, until February 26, 1896, for completing the well. In December, 1895, a well was drilled, but neither gas nor oil was found. The casing was withdrawn from the well, and removed from the premises, leaving the derrick, and also the drive pipe in the well. Wolf died July 16, 1896, testate, his will was probated July 21, 1896, in Piatt county, Illinois, and letters testamentary were issued to John Wolf and George T. Warren, named as executors in the will, who continued to act as such after October 18, 1899. On September 17, 1896, the will was admitted to probate in Wells county, Indiana. Afterward, the executors, acting under the will, caused the real estate in question to be appraised in February, 1899, and duly advertised the land and sold the same to appellees. Zeigler never paid any sum whatever as rental or otherwise under the lease except the heretofore-mentioned sum of \$107.25, and never produced any oil or gas or any mineral under the lease from the well drilled in 1895, but the well was wholly worthless and abandoned by Zeigler as wholly worthless. Zeigler never attempted to put down any other well on the premises or under the lease prior to the summer of 1899, and never entered on the premises after the abandonment of the first well nor attempted to drill or operate thereon prior to the summer of 1899. On October 13, 1899, Zeigler, without any other lease or written contract or authority so to do than the lease above mentioned, sunk and completed a well on the land in which oil was found in paying quantities.

Upon these facts the court stated as conclusions of law, that appellees are the owners in fee of the land and are entitled to possession, and that they are entitled to recover

costs. The judgment quieted the title to the land in appellees.

Upon the facts found the lease, by virtue of its provisions, had either terminated before appellant sunk the well in October, 1899, or it had continued in force and was still in force on that date, and this without reference to anything the executors may have said or done at the time of the sale. It is not shown that they had any authority except to sell the land and distribute the proceeds. If the lease had terminated they had no authority to revive it; and if the lease was in force when the well was sunk in 1899 it was in force because it had continued in force from the time it was executed. So that it is immaterial what the executors said or did at the time the well was sunk. No act or statement of theirs was necessary if the lease was still in force, and, if it had terminated, no act or statement of theirs could revive the old lease, and it is not claimed that they undertook to make a new lease.

The question is, what is the proper construction to be given the following provision:

"In case no well is completed within thirty days from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of \$143 annually for each year such completion is delayed. A deposit to the credit of first party in any bank doing business in Montpelier, Indiana, will be good and sufficient payment for any money falling due on this grant. Payable quarterly in advance, namely, \$35.75 every three months. The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time."

The time in which a well should be completed was postponed to February 26, 1896, by the payment of the \$107.25. Within that time—in December, 1895—a well was sunk on the land, but neither oil nor gas was found, and a part of the appliances was removed from the premises and the well abandoned as worthless. Appellant never paid

any sum as rental or otherwise under the lease except the \$107.25, never entered upon the premises after the abandonment of the first well, and never attempted to put down any other well until in the summer of 1899—a period of about three years—when he sunk and completed a second well which produced oil in paying quantities.

The provisions of this lease are substantially like those in the case of *Ohio Oil Co. v. Detamore* (1905), 165 Ind. 243. In that case payments had been made extending the time for completing a well until August 29, 1897. In March, 1897, an unproductive well was drilled, and the drill and other appliances removed from the premises. No further payments were made and no further steps taken under the contract until the spring of 1901, when a second well was drilled. This well was drilled under a proposition made by appellees that appellant would pay the back rent, \$960 or more being then due upon the basis of the old contract's being still in force. No part of this payment was ever made or tendered. This well was a small producer of oil, but was abandoned in January, 1902, and all machinery and appliances removed from the premises. No further steps were taken to develop the property, and on August 12, 1902, appellees brought suit to quiet title. On August 18, 1902, pending the suit, appellant, over appellees' objection, returned to the premises and drilled well number three. In the opinion it is held that "the drilling of a dry hole in the spring of 1897, and then taking down the rig and removing all the machinery and other property from the premises, accompanied with the failure to pay in advance for another six months, marked the end of contractual relations between appellees and appellant's assignor," and that the arrangement made in the spring of 1901 was not a waiver of the default under the old contract, "for the old contract having become *nil*, there was nothing issuing from it to waive, nor was it, strictly speaking, a rehabilitation of the old contract, but in all

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essential respects a new, independent, parol contract," and that appellant's "rights in the land having been lost by a disregard of its obligation, or by the exercise of its option not to go on with the exploration, could not, without appellees' consent, be reclaimed by anything it did, or offered to do, subsequently to the bringing of this suit." These holdings are applicable and controlling in the case at bar.

Judgment affirmed.

STATE, EX REL. BEDSTER, *v.* FRENTRESS ET AL.

[No. 5,593. Filed January 31, 1906.]

1. EVIDENCE.—*Bonds.—Deputy Marshal.—Appointment.*—Where defendant deputy marshal, in the discharge of the duties of his office, unlawfully beat plaintiff, his official bond is admissible in evidence in an action on such bond for damages for such injury, though there was no record made by the town trustees of his appointment or of his length of term and no approval of his bond, where the evidence introduced justified an inference that such appointment was made, the bond executed and delivered and that the principal therein had acted as deputy marshal for three or four months prior thereto. p. 246.
2. MUNICIPAL CORPORATIONS.—*Towns.—Trustees.—Deputy Marshal.—Appointment.*—The board of trustees of a town have the power to appoint a deputy marshal (§§4350, 4351 Burns 1901, Acts 1893, p. 293, §§1, 2). p. 247.
3. OFFICERS.—*Deputy Marshal.—Right to Deny Capacity.*—Defendant, who has been acting deputy marshal for several months, is estopped, in an action on his official bond for damages, from denying that he was an officer *de jure*. p. 247.
4. SAME.—*Appointment.—Collateral Attack.*—Where defendant has been serving as deputy marshal for several months, his appointment is not subject to a collateral attack. p. 247.
5. SAME.—*Bonds.—Approval.—Liability.*—Where defendant deputy marshal executed his bond with surety to the town, the fact that the town trustees failed to approve such bond does not release the surety. p. 247.
6. SAME.—*Appointment.—Failure to Designate Term.*—The failure of the town trustees to designate the term for which a deputy marshal was appointed does not release him or his surety on his official bond where it is shown that he was acting under such appointment. p. 247.

State, *ex rel.*, v. Frentress—37 Ind. App. 245.

From Orange Circuit Court; *Thomas B. Buskirk*, Judge.

Action by the State of Indiana, on the relation of Lee Bedster, against Winslow Frentress and another. From a judgment for defendants, plaintiff appeals. *Reversed.*

Lambdin, McCormick & Gilkison, for appellant.

W. J. Buskirk and Perry McCart, for appellees.

ROBY, C. J.—Suit upon an official bond executed by appellee Frentress as principal and appellee Ballard as surety, and conditioned for the faithful discharge by the former of the duties required of him as deputy marshal of the town of West Baden. It is averred that said Frentress arrested the relator, who was intoxicated and made no resistance thereto, and that said Frentress thereafter, without cause or provocation, assaulted the relator with a deadly weapon, and inflicted serious and permanent injury upon him. Issue was formed by general denial.

Upon the trial evidence was introduced tending to sustain the averments of the complaint. An objection was sustained to the introduction of the bond, and the

1. correctness of that ruling, because of which the defendants had judgment, is the question for decision.

The objection was placed upon three grounds: (1) That there was no proof of the appointment of Frentress as deputy marshal by the board of trustees of said town; (2) that there was no proof of any time fixed for his term, if he was appointed; (3) there was no evidence of the approval of the bond by said board. There was evidence introduced justifying the inference that such appointment was made and the bond in suit delivered to the proper authorities, from whose possession it was obtained for use at the trial. No record of the appointment was made, but it was shown, without contradiction, that appellee Frentress acted as such officer for three or four months prior to the assault and battery complained of, after which the board asked him to quit. The bond in suit contained an

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oath of office, duly subscribed and made. The relator was arrested by said appellee acting as such officer.

2. The board of trustees of said town had power to appoint a deputy marshal, to regulate the amount of his bond and compensation, and his term of service. §§4350, 4351 Burns 1901, Acts 1893, p. 293, §§1, 2. The evidence justified the conclusion that he was so ap-

3. pointed and was acting as an officer *de facto* at least. He can not now be heard to say that he was not an officer *de jure*. *State v. Duncan* (1899), 153 Ind. 318.

His right to the office can not be collaterally questioned, whatever might be done in a direct proceeding for

4. that purpose. *Case v. State, ex rel.* (1879), 69 Ind. 46; *Mowbray v. State, ex rel.* (1882), 88 Ind. 324; *Parker v. State, ex rel.* (1892), 133 Ind. 178, 200, 18 L. R. A. 567.

The examination and approval of the bond was a public duty, the neglect of which does not affect the liability of the surety in an action for the default of the

5. principal. *Mowbray v. State, ex rel., supra*; *Mechem, Pub. Officers*, §§311-314.

The same considerations control with regard to the length of time for which the officer was appointed. A failure upon the part of the board to designate such

6. term is immaterial, the act complained of occurring at a time when the officer was in fact acting thereunder.

Judgment reversed, and cause remanded, with instructions to sustain motion for a new trial, and further proceedings not inconsistent herewith.

INDIANAPOLIS NORTHERN TRACTION COMPANY
v. DUNN ET AL.

[No. 5,474. Filed November 28, 1905. Rehearing denied January 31, 1906.]

1. EMINENT DOMAIN.—*Interurban Railroads.—Award.—Effect.*—The award of appraisers in condemning land for a right of way for an interurban railroad is not final but either party may except thereto and appeal. p. 249.
2. SAME.—*Interurban Railroads.—Payment.—Title.*—The payment of an award in condemnation gives an interurban railroad company the right to possession of the condemned land, and if no appeal be taken, such payment gives title which relates from the day of payment. p. 250.
3. SAME.—*Interurban Railroads.—Appeal from Award.—Trial.*—Where an interurban railroad company appeals from an award in condemnation, the cause on appeal is tried *de novo*, and if the judgment on appeal is greater than the award, such company must pay same or such land can not be held. p. 250.
4. SAME.—*Interurban Railroads.—Award.—Receipt of.—Effect.*—If a landowner accepts the money in payment of an award in condemnation of an interurban railroad right of way, he is estopped from afterwards appealing or questioning such award. p. 250.
5. SAME.—*Interurban Railroads.—Appeal from Award.—Effect.*—An interurban railroad company may appeal from an award in condemnation although it has paid such award into court, such payment giving it the immediate right to possession. p. 251.
6. TRIAL.—*Instructions.—Damages.—Elements.—Interurban Railroads.*—Where the court properly instructed the jury as to the elements of damage in condemning an interurban railroad right of way over lands, the fact that such instruction included as a basis for damage "any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises," does not constitute reversible error. p. 251.
7. EMINENT DOMAIN.—*Interurban Railroads.—Damages.—Benefits.—Statutes.*—The statutes permitting interurban railroad companies to condemn lands for a right of way must be construed *in pari materia* with those granting such rights to railroads, and no benefits can be considered in estimating such damages. p. 252.

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8. TRIAL.—*Instructions.—Witnesses.—Evidence.—Weight.*—An instruction that the jury might consider whether witnesses in a condemnation case were practical farmers or mere landowners but that the weight to be given to such facts was for them alone, is not an invasion of the province of the jury. p. 253.
9. EVIDENCE.—*Admissions.—Eminent Domain.—Interurban Railroads.—Compromise.*—An offer made by a landowner as a compromise of damages prior to the taking of his land by condemnation proceedings by an interurban railroad company for its right of way, is not admissible in evidence in such action as an admission. p. 253.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Condemnation proceedings by the Indianapolis Northern Traction Company against Peter Dunn and another. From a judgment for defendants, plaintiff appeals. *Affirmed.*

James A. Van Osdol and *Loveland & Loveland*, for appellant.

Cox, Reasoner & O'Hara, for appellees.

ROBINSON, J.—On April 4, 1903, appraisers, appointed in condemnation proceedings instituted by appellant, awarded appellees \$1,100. On April 13, 1903, appellant filed its exceptions to the award, and on May 8, 1903, paid the amount of the award to the clerk of the circuit court. On the same day the clerk paid the award so received to the attorneys of appellees. Afterward the case was tried before a jury in the circuit court on the issues raised by the exceptions filed by appellant, and a verdict for \$1,350 returned by the jury in favor of appellees. Judgment was rendered in appellees' favor for \$1,350, but, upon appellant's motion, was afterwards modified and rendered for \$250.

The award of the appraisers was only an initiatory step in the proceedings, which might or might not be

1. final, at the option of the parties. *Norristown, etc., Turnpike Co. v. Burket* (1866), 26 Ind. 53.

When appellant paid the amount awarded by the appraisers, it had a right to the possession and a *prima facie* claim to the land, subject to an appeal within the

2. time fixed by statute. If at the end of that time no appeal had been taken the title to the land would have vested, and would have related back to the date of payment. As an appeal was taken, appellant did not acquire title, but did have the right to hold possession and proceed with the construction of its road pending litigation. It asked the circuit court to fix the compensation that should be paid. It continued the proceedings. By its own act it created a condition with which it must comply before it could acquire title. Having prosecuted its appeal to judgment it must pay or tender the amount so fixed by the court, and on failure to do so it acquires no title to the land, and its right to hold possession and prosecute its work ceases. When it took an appeal to the circuit court the question of just compensation was tried *de*

3. *novo*. "The prayer for an appeal," said the court in *Lake Erie, etc., R. Co. v. Kinsey* (1882), 87 Ind. 514, "and the intention to take an appeal, do not continue the litigation or in any way interfere with the finality of the judgment as to the just compensation; and if the judgment on appeal is for more than the award of the appraisers, the difference must be paid or tendered before the land can be finally taken. *Mills, Eminent Domain*, §137; *Peterson v. Ferreby* [1870], 30 Iowa 327; *Richards v. Des Moines Valley R. Co.* [1865], 18 Iowa 259; *Blackshire v. Atchison, etc., R. Co.* [1874], 13 Kan. 514." See, also, *Terre Haute, etc., R. Co. v. Crawford* (1885), 100 Ind. 550.

Appellees filed no exceptions to the award made by the appraisers, and when appellant paid the amount into court appellees were entitled to receive the money. Had

4. appellees filed exceptions and appealed, and had then received the amount awarded and paid into

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court, they could not further prosecute their appeal. It is a well-settled rule that a party can not accept the benefit of an adjudication and yet allege it to be erroneous. See *Baltimore, etc., R. Co. v. Johnson* (1882), 84 Ind. 420, and cases cited. But appellees are not questioning the award of the appraisers. They thought proper to abide by the award. That the question of damages was litigated in the circuit court was not of their choosing. They were taken into the circuit court by appellant to litigate the question of just compensation *de novo*. The same question was to be tried that would have been for trial had the appeal from the award been taken by appellees. The result of the appeal by appellant was to set aside the report of the appraisers so far as appellant was concerned. The payment of the award into court by appellant was not made to stay execution. The purpose of the payment is

5. clear. Appellant could, under the statute, derive a benefit by paying the award into court. It was not estopped from appealing by such payment. See *Cleveland, etc., R. Co. v. Nowlin* (1904), 163 Ind. 497; *Union Traction Co. v. Basey* (1905), 164 Ind. 249.

Complaint is made of the following instruction: "In estimating the damages suffered by Peter Dunn, the owner of the real estate in controversy, you may take into

6. consideration the manner in which the land is divided by the line of the traction company as affecting the size and shape of the fields, as affecting the access to the woods pasture, and as affecting the passage from one part of the farm to another, to which may be added any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises. The rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, not including such as may arise from negligence

or unskilfulness or from wrongful acts of those engaged in the work, must be assessed. Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all the injuries resulting from the appropriation."

Objection is made to that part of the instruction which says the jury may consider "any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises." While we do not approve this instruction, yet, in view of the instructions given at appellant's request, we do not think there was reversible error in giving it. At appellant's request the jury were told that in assessing the damages they could not take into consideration remote or fanciful injuries which rest wholly in conjecture, and do not admit of an estimate in damages; and certain particular things were specified which the jury were told they could not consider in estimating the damages.

Objection is made to that part of the second instruction telling the jury that in estimating the damages they could not take into consideration possible benefits which

7. might accrue by reason of the construction of the road. The statute concerning the appropriation of land and assessment of damages (§893 *et seq.* Burns 1901, §881 R. S. 1881) and that providing for the condemnation of land by railroads, must be construed *in pari materia*. *Swinney v. Ft. Wayne, etc., R. Co.* (1877), 59 Ind. 205; *Great Western, etc., Oil Co. v. Hawkins* (1903), 30 Ind. App. 557; *McMahon v. Cincinnati, etc., R. Co.* (1854), 5 Ind. 413. Section 922 Burns 1901, §910 R. S. 1881, provides that in estimating the damages no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work. See *Evansville, etc., R. Co. v. Fitzpatrick* (1858), 10 Ind. 120; *White Water Valley R. Co. v. McClure* (1868), 29 Ind. 536; *Chicago, etc., R. Co. v. Winslow* (1901), 27 Ind. App. 316.

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The court instructed the jury that, in weighing the testimony of different witnesses as to the effect on appellee's remaining lands, for farming purposes, of the tak-

8. ing of the strip condemned, they might consider whether the witness was a practical farmer of experience or a mere owner of real estate, who had little, if any, experience in the actual work and management of a farm, "bearing in mind, however, that you alone are to determine whether these facts have been shown, and what weight, if any, is to be given to these facts." The court did not, in this instruction, tell the jury that the testimony of one class of witnesses was entitled to greater weight than the testimony of another class. The jury had the right to consider the fact, if it was a fact, that some of the witnesses were practical farmers of experience, and that others were not. In all cases the jury must determine for themselves to what witnesses they will give the most credence, and in the above instruction the court did not invade this right. In *Cline v. Lindsey* (1887), 110 Ind. 337, a suit to contest a will, it is held that the jury has the right to consider the fact that some of the witnesses may have had greater opportunities than others, and that the court may instruct them that they have such right. In *Woollen v. Whitacre* (1883), 91 Ind. 502, it is held that the trial court properly refused to instruct that it was the duty of the jury to consider the interest of a witness in determining his credibility, but it was held proper to instruct that in considering the credibility of a witness certain things might be considered by them.

A failure to agree with the landowner as to the compensation for the land sought to be appropriated was a condition precedent to any standing in court by the

9. petitioner. As it was a fact essential to the petition to condemn, it was necessary to show that there had been a failure to agree. But we fail to see any reason for any distinction between an offer made by the landowner in

the effort to agree and an offer made before suit for the purpose of compromising a claim, so far as the offer was to be considered an admission by the landowner. And that was the purpose for which it was here sought to be used. The same reasoning that excludes an offer to compromise as an admission will exclude an offer made by the landowner for the purpose of agreeing upon the compensation to be paid. An offer made to avoid controversy and to save the expense of vexatious litigation can not properly be called an admission. See *West v. Smith* (1879), 101 U. S. 263, 25 L. Ed. 809.

The verdict returned by the jury is not such as suggests that they were influenced by passion and prejudice. There is evidence to sustain the findings of the jury. We can not disturb the conclusion reached by them without weighing the evidence, and this we can not do.

Judgment affirmed.

FLETCHER v. KELLY, BY NEXT FRIEND.

[No. 5,574. Filed February 1, 1906.]

1. **APPEAL AND ERROR.—Elevators.—Negligence.—Weighing Evidence.**—Where there is some evidence that defendant was negligent in the maintenance of an elevator in which plaintiff was injured, the decision of the trial court will not be disturbed. p. 260.
2. **SAME.—Elevators.—Contributory Negligence.—Weighing Evidence.**—Where there is evidence from which the jury could find that plaintiff was not guilty of contributory negligence in stepping into an elevator shaft, thereby receiving injuries, a verdict for plaintiff will not be disturbed on appeal. *Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607, held inapplicable. p. 260.
3. **EVIDENCE.—View of Premises by Jury.**—The jury have a right to treat their view of the premises, ordered by the judge, as evidence in the cause. p. 261.
4. **APPEAL AND ERROR.—Instructions.—Exceptions.—How Shown.**—Where an instruction in the record contained at its close the words: "Given and excepted to May 26, 1904, James M.

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Leathers, judge," and it is not shown by the record or bill of exceptions otherwise that any exception was reserved, no question thereon is saved. *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590, followed. p. 262.

From Superior Court of Marion County (66,723);
James M. Leathers, Judge.

Action by Mary J. Kelly, by her next friend, against Stoughton J. Fletcher. From a judgment on a verdict for \$1,000, defendant appeals. *Affirmed*.

Smith, Duncan, Hornbrook & Smith, for appellant.

Henry M. Dowling and *Frederick W. Sheets*, for appellee.

WILEY, J.—Appellant owns a business block on the north side of Washington street, in the city of Indianapolis. The upper floors are rented to tenants for office purposes, and a passenger elevator is maintained and operated for their accommodation, and for the use of persons lawfully using the same. The elevator shaft extends from the basement to the top floor of the building. Appellee went into the building on a bright day, near 1 o'clock p. m., for the purpose of taking the elevator to go to one of the upper floors, and stepped into the elevator shaft, while the elevator was above the ground floor, and fell into the basement, by which she was injured. She brought this action to recover damages growing out of the accident, and succeeded in the court below.

Appellant's motion for a new trial was denied, and the overruling of that motion is the only error assigned. The negligence alleged is that it was customary when the elevator was above the ground floor to keep the door opening into the shaft closed, and when the elevator was at the ground floor to keep the door open; that the elevator shaft and the hallway leading thereto from the entrance of the building upon the ground floor were, on the occasion of the accident, and long prior thereto had been, dark and unlighted; that at that time appellant negligently permitted

the door to the elevator on the ground floor to remain open while the elevator was being run and operated above the ground floor; that about 1 o'clock on the 9th day of July, 1903, while said door on the ground floor was open, and the elevator was above, appellee carefully entered the building on the ground floor, for the purpose of visiting a person in the employ of a tenant of appellant upon one of the upper floors; that she carefully approached the elevator for the purpose of taking passage, and saw the elevator door was open, but, by reason of the darkness of the hallway, entrance and shaft, and for the further reason that coming from the intense light of Washington street her sight was confused and partly blinded, she was unable to look beyond and see whether the elevator was in position beyond the door; that she was ignorant of the fact that the elevator was not present, and that such shaft was open and exposed; that, proceeding with due care and caution, she stepped through said door, and fell to the bottom of the shaft, to her injury, etc.

Appellant moved for a new trial upon three grounds:

(1) That the verdict was not sustained by sufficient evidence; (2) that the verdict was contrary to law; and (3) that the court erred in giving three instructions.

In the able brief of counsel it is said: "The entire argument in the case is based upon the situation produced by the evidence in this cause. The argument is addressed to two propositions: (1) The verdict is not sustained by the evidence, but, upon the contrary, is in direct and positive conflict therewith. (2) That the evidence was such as that it was error to give the thirteenth instruction given by the court on its own motion." By this statement it is made plain that the decision is confined within very narrow limits. It is substantially conceded by counsel for appellant that there is direct and positive evidence supportive of every material fact necessary to establish appellee's case, as made by her complaint, but that there are facts

disclosed by the record which ought to outweigh such evidence, and for that reason a reversal should be ordered. In view of the earnest and well-timed argument addressed to this branch of the case, we deem it important to give a résumé of the evidence bearing upon it. That evidence is directed to two important facts: (1) Whether the door to the elevator shaft was open when appellee approached it, or whether she opened it. (2) Whether the light in the hallway was such as would enable her to see, if she had given any heed to it, that the elevator was not present, even though the door was standing open when she came to it.

Appellee testified that when she came into the building the boy who ran the elevator was sitting in front of the south wall of the elevator, as he always did when he had no calls; that the door was open about two feet; that as she came up to the door she had two packages and her pocketbook in her right hand, and that as she passed through she put her left hand up, pushed the door back a little, and stepped into the shaft. She also testified on cross-examination that she did not put her fingers between the bars of the door and open the lock and throw the door back against the north wall. She further stated that when she stepped into the elevator shaft the door was open far enough for her to pass through without her throwing it back, and she did not know why she did it. Upon the question of light, appellee testified that the elevator shaft was so dark that she could not see that the elevator was not there.

Doctor Westover, who was immediately called to attend appellee, testified that the hallway was dark, and specially appeared so to one coming in from Washington street; that neither the elevator shaft nor the elevator cage was artificially lighted, and that the inside walls of the shaft were dingy and dirty and black with dust; that the direct rays of the sun did not shine into the hallway; that the light in the hallway would be reflected from the pavement out-

side; that "it is a dingy little bit of a hallway there, with no light from the sun."

There seems to be no substantial conflict in the evidence as to the physical conditions surrounding the hallway, shaft and elevator. The boy who ran the elevator, and who was sitting by the shaft when appellee entered the building, testified that the door was closed, and that she "rushed in there and opened the door and threw it back;" that he jumped up and tried to warn her that the elevator was not there, but that she was too fast, and that he could not get there in time. He said he did not see her put her hand in and open the latch; that the latch made a clicking sound, and that his statement that she opened the door was based upon his "hearing the click." The person who was in temporary charge of the elevator testified that when he started up with the elevator he closed the door "by pushing it shut." Soon after the accident, and while appellee was in a high state of excitement and nervousness, and was hysterical, she made admissions to several persons, who were witnesses at the trial, that when she entered the building and approached the elevator shaft the door leading thereto was closed; that she opened it and just stepped in.

It is disclosed by the evidence that appellee had been in the building a short time before the accident, and had gone down in the elevator. One witness, in detailing what appellee said about it, testified as follows: "I asked her how it happened. She said that John was running the elevator when she went down, and that when she came back he was sitting on a chair outside, and she supposed he was still running the elevator—that another boy was running it, though—and she thought she would hurry and get in and surprise him and be in there when he got in—before he got there, rather; and she said she just reached in and opened the door, and did not look to see whether the elevator was there or not, and stepped off." This was soon after she was hurt. To other witnesses, while she was still in a state of

excitement, etc., she stated that her injury was occasioned by her own fault. As against her admissions that she opened the door, and in support of her statement that it was open when she approached it, appellant testified that when the door was closed and the elevator up, the door could not be opened.

Appellee knew that the elevator boy was usually sitting in front of the south wall of the elevator shaft when the elevator was open at the ground floor ready to receive passengers. She knew that this boy—John Kelly—ran the elevator all day except from 12 to 1 o'clock, when the janitor ran it. She testified that on the day of the accident, a little while before 1 o'clock, she was taken up and brought down in the elevator by the janitor, and that John Kelly was not there. Kelly, however, contradicted this statement by saying that about 11:55 o'clock he took appellee up; that she stayed upstairs about four minutes; that he then brought her down, and turned the elevator over to the janitor.

It is further disclosed by the evidence that the day was clear and the sun was shining bright. The physical conditions and surroundings are succinctly and correctly described in appellant's brief as follows: "The building faces south. The south wall of the building is two feet eight and one-quarter inches thick. The doorway through this wall is four feet eight inches in width. Immediately after passing through the wall the hallway widens eight inches on each side, so that the hallway is six feet wide. From the inside of the doorway to the elevator shaft the distance is five feet two and one-quarter inches. The elevator shaft projects from the east side of the hall into the hallway two feet and nine inches, and it is three feet and four inches from the west side of the elevator shaft to the west side of the hallway."

Upon these facts we are asked to reverse the judgment, for the reason that the verdict is not sustained by sufficient

evidence. Upon the issue of negligence on the part

1. of appellant, as tendered by the complaint and the answer in denial, the burden was upon appellee to establish it. There was direct and positive evidence in support of that issue. Upon that evidence that issue was submitted to the jury, and by their general verdict it was determined adversely to appellant. There is positive and direct evidence in the record upon which the verdict and judgment may securely rest.

As to the issue of appellee's negligence, or her freedom from fault contributing to her injury, the burden was upon appellant, and under the evidence it was a question

2. of fact to be determined by the jury upon proper instructions. The jury resolved that question in her favor, both by the general verdict and answers to interrogatories.

In their brief counsel for appellant "admit that there does seem to be evidence supporting the plaintiff's case at every material point necessary to her recovery; for it is very true she says that the hall was dark, and that she could not see whether the elevator was present or not, and that the door was open." This is an admission that under the evidence the jury was justified in finding that appellant was guilty of negligence as charged, and that appellee was free from fault. As to the admissions made by appellee as to how she was injured, and that she opened the door and just stepped into the elevator shaft, they are met by her flat denial that she ever made such statements to the several witnesses who testified concerning them. The evidence of those witnesses and her denial presented to the jury a material question of fact, and they determined that question in her favor.

Upon the question of fact as to whether the hall was dark and appellee could not see, in view of the fact that she testified positively and directly that it was dark and she could not see whether the elevator was present in front

of the open door, counsel urge that her positive evidence is overthrown and contradicted by the laws of physics as to the dispersion of light. In this connection counsel base their contention upon the following proposition: "If the recognized laws of nature contradict the testimony of witnesses, the latter will not be considered, and such testimony will not prevent the Appellate Court from holding that a verdict based thereon has no evidence to sustain it." They cite the case of *Cleveland, etc., R. Co. v. Berry* (1899), 152 Ind. 607, 46 L. R. A. 33, to support the proposition. As applied to the facts here, the question decided in that case is not applicable.

Appellee is supported in her statements in regard to existing physical conditions surrounding the scene of her injury, as to the hall and elevator shaft's being dark, by the evidence of Dr. Westover. The elevator was entered from the west. The east wall of the shaft was brick. The jury found by their answers to the interrogatories that on the occasion of the accident a person standing in front of the open door of the elevator shaft could not, by giving attention, have readily seen through the opening into the elevator shaft and across the shaft, and seen the east wall thereof. Also, that if she had been looking for that purpose she could not readily have seen that the elevator was not there. The jury also found specifically that the door was open when she approached it. Under the direction of the court, and in charge of a bailiff, the jury viewed

3. the premises. They not only heard the evidence as to the disputed facts, but had an ocular view of the surroundings of the scene of the accident, and from what they saw, which they had a right to consider, and from the facts which they believed were established by the evidence, they resolved every issuable fact in favor of appellee and against appellant. This being true, we can not disturb the judgment upon the evidence without constituting ourselves triers of questions of disputed facts, and

this we can not do. *Morgan v. Jackson* (1904), 32 Ind. App. 169; *Roberts v. Koss* (1904), 32 Ind. App. 510.

But one other question is discussed, and that is the alleged error of the trial court in giving instruction thirteen on its own motion. Conceding, without decid-

4. ing, that all the instructions are in the record, appellant is not entitled to have the thirteenth instruction considered, because it does not appear from the record that he reserved any exception to the giving of it. At the conclusion of this instruction are these words: "Given and excepted to May 26, 1904, James M. Leathers, judge." In *Indiana, etc., R. Co. v. Bundy* (1899), 152 Ind. 590, it was held that where an exception to an instruction given by the court on its own motion by an indorsement on the margin thereof, "Given and excepted to," and signed by the judge, does not properly present any question, where it is not shown by the bill of exceptions that either party took or reserved exceptions to such instruction. No such a showing is made here, and nowhere in the record does it appear that either party took or reserved an exception. Under the authority cited, we can not consider the instruction.

This disposes of every question relied upon and discussed; and, finding no error, the judgment is affirmed.

INDIANAPOLIS & MARTINSVILLE RAPID TRANSIT COMPANY v. REEDER, ADMINISTRATOR.

[No. 5,580. Filed February 1, 1906.]

1. **APPEAL AND ERROR.—Briefs.—Waiver.**—Alleged errors not discussed in appellant's brief are waived. p. 263.
2. **SAME.—Admission of Evidence.—Harmless Error.**—Where appellant admitted its liability and on appeal did not question the amount of recovery, alleged erroneous admission of evidence is harmless. p. 263.

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3. EVIDENCE.—*Expressions of Pain.*—*Physicians.*—Evidence by a physician of his patient's expressions of pain during treatment is admissible. p. 264.
4. SAME.—*Physicians.*—*Opinions.*—A physician's opinion as to the amount or degree of pain suffered by a patient is admissible in evidence, even though it be a conclusion. p. 264.

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Action by Nellie Reeder, upon whose death after trial, John C. Reeder as administrator of her estate was substituted as plaintiff, against the Indianapolis & Martinsville Rapid Transit Company. From a judgment on a verdict for plaintiff, defendant appeals. *Affirmed.*

Charles O. Roemler and *James L. Clark*, for appellant.
Brill & Harvey, for appellee.

ROBY, J.—Action by Nellie Reeder for damages on account of personal injuries caused by a collision between cars upon one of which she was being carried as a passenger. Her death occurring after trial, her administrator was substituted as plaintiff. Upon the trial of the cause the appellant formally admitted that it was a common carrier of passengers at the time of the accident; that the plaintiff was a passenger upon one of its cars; that it did not transport her safely and with due care, but that a collision occurred by reason of its negligence, and that it was liable for any injury which she may have sustained by reason of said collision.

The cause was submitted to a jury, a verdict and judgment for \$3,200, motion for a new trial overruled, and such action of the court assigned for error. In the

1. motion for a new trial it is stated that the damages assessed by the jury are excessive, but the proposition is not referred to in argument, and is therefore waived.

- The points argued relate to the admissibility of
2. evidence, and, if well taken, would not justify a reversal of the judgment, appellant's liability be-

ing admitted, and the amount of recovery not questioned.

The trial court did not, however, err in the rulings complained of. The statements of an injured party made to a physician, expressive of his then present existing

3. physical condition, may be given by the physician as a part of his testimony. *Cleveland, etc., R. Co. v. Newell* (1885), 104 Ind. 264, 269, 54 Am. Rep. 312; *Louisville, etc., R. Co. v. Snyder* (1889), 117 Ind. 435, 3 L. R. A. 434, 10 Am. St. 60; 1 Elliott, Evidence, §527. There was therefore no error in admitting the testimony of Dr. Kimberlin.

Dr. Reagan was asked the following question: "Doctor, to what extent has this woman suffered pain since this injury was inflicted upon her, as you have observed

4. it? A. As I have observed it, she has suffered quite a good deal." The objection made was that the question called for a conclusion. If so, it was one competent for an expert witness to give; but, while the fact might be more keenly appreciated by the person suffering than by an onlooker, it was nevertheless a fact relative to which the onlooker, especially where he was a physician, might testify.

The judgment is affirmed.

INDIANAPOLIS NORTHERN TRACTION COMPANY v. RAMER.

[No. 5,673. Filed February 1, 1906.]

1. STATUTES.—*In Pari Materia*.—*Railroads*.—*Eminent Domain*.—*Benefits*.—Article 41 of the civil code of 1852, 2 R. S. 1852, p. 188, §683 *et seq.*, §893 *et seq.* Burns 1901, §881 *et seq.* R. S. 1881, and 1 R. S. 1852, p. 409, §5134 *et seq.* Burns 1901, §3885 *et seq.* R. S. 1881, both providing for the assessment of damages in cases of railroads exercising the right of eminent domain, being enacted at the same session, are construed *in pari materia*; and damages may be legally assessed by either method, but in neither case can benefits be offset against damages sustained by the landowner. p. 266.

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2. **EASEMENTS.—Additional Servitudes.—Street Railroads.**—A street railroad in a city street does not constitute an additional servitude upon the frontagers' lots. p. 270.
3. **STATUTES.—Construction.—In Pari Materia.**—Statutes upon the same general subject when constituting part of a general system of legislation, though they were not enacted at the same session, will be construed *in pari materia*. p. 271.
4. **SAME.—Interurban Railroads.—Eminent Domain.—Benefits.**—The act of 1901 (Acts 1901, p. 461, §5468a Burns 1901) and the amendatory act of 1903 (Acts 1903, p. 92), providing for the condemnation of land for rights of way for interurban railroads, and having substantially adopted the provisions of the statutes relating to the condemnation of lands by railroad companies, will be construed *in pari materia* with such statutes, and no benefits can be considered in estimating damages for the condemnation of rights of way for such interurban roads. p. 272.
5. **EMINENT DOMAIN.—Interurban Railroads.—Damages.—Elements.—Speculative.**—In determining the damages to a landowner by the appropriation of a right of way for an interurban railroad the jury should consider such owner's inconvenience thereby, loss in tillage, use and occupation of the land, annoyance by the operation of the road, exposure of plaintiff, family and stock to injury, and annoyance, inconvenience and danger in crossing from one part of the farm to the other, but speculative damages can not be given. p. 272.
6. **SAME.—Burden of Proof.**—The burden of proof in cases of eminent domain is upon the landowner to show his loss. p. 273.

From Cass Circuit Court; *John S. Lairy*, Judge.

Condemnation proceedings by the Indianapolis Northern Traction Company against William Ramer. From a judgment for defendant plaintiff appeals. *Affirmed*.

J. A. Van Osdol, McConnell, Jenkines, Jenkines & Stuart, for appellant.

Nelson, Myers & Yarlott, for appellee.

BLACK, P. J.—This was a proceeding brought by the appellant to appropriate a strip of land, part of a farm owned by the appellee, for the purpose of constructing, maintaining and operating thereon its interurban street railroad, extending from the city of Indianapolis to various other cities, and running through said farm; the instru-

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ment of appropriation purporting to be founded on the statutes of this State, and especially on the act of March 11, 1901 (Acts 1901, p. 461, §5468a *et seq.* Burns 1901), and the act amendatory of certain sections thereof approved February 26, 1903 (Acts 1903, p. 92, §5468a *et seq.* Burns 1905).

The third instruction given to the jury at the request of the appellee was as follows: "In assessing the damages to the defendant's land, you can not take into consideration any benefits or supposed benefits to his land, or to the lands of others, or to the community or public in general, by reason of the railroad's being constructed and operated through the district." In the eighth instruction given it was, in part, said: "You are not allowed to take into account any supposed benefit to Ramer by reason of the location of the road in that vicinity, in mitigation of damages."

In urging upon our attention the action of the court in thus instructing, counsel have discussed the question whether, in assessing damages arising from the

1. appropriation of part of a tract of land owned by one person for the way of an interurban electric railroad under the statute relating thereto, benefits to the remainder of the tract may be considered, or whether, in estimating such damages, no deduction should be made for any benefit that may be supposed to result to the owner from the contemplated work, as in the case of an appropriation for the way of a commercial or steam railroad.

In our civil code of 1852 (2 R. S. 1852, p. 188, §683 *et seq.*) provisions were made for the "writ of assessment of damages." Section 706 (2 R. S. 1852, p. 193) was as follows: "When any person, corporation, or company design to construct a canal, or railroad, or turnpike, graded, McAdamized, or plank road, or bridge, or establish a ferry, as a work of public utility, although for private profit, being authorized by law to take real property therefor,

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such person, corporation or company, may have a writ of assessment of damages." The writ was to be issued to the sheriff, directing him to assess the damages by a jury. Section 711 (2 R. S. 1852, p. 193) provided: "In estimating any damages under this chapter [article], no deduction shall be made for any benefit that may be supposed to result to the owner, from the contemplated work." These provisions of 1852 were incorporated in the revised code of 1881. §893 *et seq.* Burns 1901, §881 *et seq.* R. S. 1881. In the statute of 1852, providing for the incorporation of railroad companies (1 R. S. 1852, p. 409, §5134 *et seq.* Burns 1901, §3885 *et seq.* R. S. 1881), any railroad company formed under that act, which is unable to agree as to the purchase of real estate for the construction of its track, turnouts, and water stations is given (§5159 Burns 1901, §3906 R. S. 1881) the right to acquire title thereto by the special proceeding prescribed in that act. For such purpose the company is required (§5160 Burns 1901, §3907 R. S. 1881, 1 R. S. 1852, p. 414, §15) to deposit with the clerk of the circuit court or other court of record of the county an instrument of appropriation, and to deliver to the landowner or his guardian a copy of such instrument. The court is required, upon the application of either party, to appoint, by warrant, three disinterested freeholders of the county to appraise the damages. The appraisers are required to consider the injury which the landowner may sustain by reason of such railroad, and to return their assessment of damages to the clerk of such court, setting forth the value of the property taken or injury done to the property, which they assess to the owner. On making payment to the clerk, or tender to the owner, of the amount assessed, the corporation is entitled to hold the interests in the land or materials so appropriated and the privilege of using any material on such roadway and within fifty feet on each side of the center thereof. The award of the arbitrators

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may be reviewed by the court in which such proceedings are had on written exceptions filed by either party, though the company may take possession; and the proceedings on such appeal affect only the amount of compensation allowed.

In *McMahon v. Cincinnati, etc., R. Co.* (1854), 5 Ind. 413, a proceeding under section fifteen of this statute, it was said that this statute and the provisions of the civil code above mentioned were passed at the same session, relate to the same subject, and are not directly repugnant to each other, and that they may therefore be taken *in pari materia*, and considered as one enactment; that the assessment may be legally made by arbitrators appointed under the one act, or by jurors selected as prescribed in the other act, but that a deduction can not be made for any benefits that may be supposed to result to the landowner. See, also, *Evansville, etc., R. Co. v. Fitzpatrick* (1858), 10 Ind. 120.

In *White Water Valley R. Co. v. McClure* (1868), 29 Ind. 536, a like proceeding under the railroad statute, it was said concerning the provision of the code forbidding deduction for benefits: "It was evidently the intention of the legislature, in enacting this provision, to change the old rule of assessment in such cases, and to require that property taken by these corporations should be paid for without regard to any benefit or enhanced value of the residue of the owner's property by the facilities afforded by the construction of the road."

The statutory law concerning street railroads has developed, as have the uses of such railroads and the means and methods by which they are constructed and operated, from a simple beginning, for which sufficient provision was contained in the act of 1861 (Acts 1861, p. 75), relating to "street or horse" railroads upon and through the streets of cities and towns, whereby such companies were made capable of purchasing, holding and conveying the

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real and personal property necessary for the construction and equipment of their roads, switches and side-tracks, and were required to construct their tracks upon the center or the side of the street so as to conform exactly to the established grade of the street.

We will not take space to refer particularly to the various enactments whereby the legislature has recognized and authorized suburban and interurban railways, and the change of motive power by the use of electricity. In 1901 the demand for electric interurban railways had increased to such an extent that it was deemed proper by the legislature to provide for their construction through lands not within the limits of a street or highway. Acts 1901, p. 461, §5468a Burns 1901. Additional provisions were, by amendment of this statute, made in 1903. Acts 1903, p. 92, §5468a *et seq.* Burns 1905. While, in these statutes, the companies concerned are designated as street railroad companies, and the statutes purport to create rights, powers, liabilities and restrictions for street railroad companies, with reference to their interurban street railroads or suburban street railroads, they adopt for the appropriation of private property the existing methods for such appropriations for railroad companies under the statute of 1852, and by such special proceedings authorize such a company for such a purpose to enter upon, take possession of, hold and use all such lands and real estate and other property as may be necessary for the construction, maintenance and operation of its railroads, railroad stations, depots, power-houses, shops, car barns, offices, lines for transmission of electricity for heat, light and power for such companies or the public. In the section providing the method of appropriation the word "railroad" is used in the same manner as in the statute of 1852, *supra*, and that section, except in some respects not here important, employs exactly the same language and prescribes the same proceedings as does the statute of 1852.

A company organized as a street railroad company, running its cars within cities and towns, and operating also an interurban railroad, must, within the cities and

2. towns, cause its tracks to conform exactly to the established grades of the streets; and such use of the streets, with the consent of the municipal authorities, does not constitute an additional burden upon the real estate, and therefore, if the road be properly constructed and operated, no injury constituting ground of complaint is done to the abutting proprietors. *Mordhurst v. Ft. Wayne, etc., Traction Co.* (1904), 163 Ind. 268, 66 L. R. A. 105. Such use of a street is regarded as within the purposes for which it was dedicated or appropriated as a street. But an interurban railroad, not upon land already dedicated to public use, but upon and through the lands of individual proprietors, is something radically different. It is not the motive power which distinguishes a street railroad, in the original sense of the term, from a railroad in the sense of a commercial railroad as known before the introduction of electricity as a motive power for cars. The peculiar distinction of a street railroad, properly so called, is that it is so constructed and used that it does not constitute an additional burden upon the streets; its tracks conform to the grade of the street established for the ordinary uses of a street, and the operations of the railroad do not deprive the adjoining proprietor of the enjoyment of the use of the street in the ordinary manner. At least, the law remains thus, notwithstanding the developments whereby the original conditions of street railroads have been greatly modified. But when the legislature came to make provisions whereby street railroad companies, organized as such, and not as commercial railroads, may construct and operate interurban railroads running outside the limits of streets and highways, it made provisions for the appropriation of private property by the same methods as already existed for such appropriations by "railroad

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companies," and, recognizing the essential difference between such interurban railroads and street railroads, it clearly indicated its intention to class such interurban railroads with commercial railroads for the purposes of such appropriations.

The rule of construction by the aid of statutes *in pari materia* does not restrict the court to the consideration of other legislation enacted on the same day or at

3. the same session. The use of the rule, like all other methods of construction, is to ascertain the intention of the legislature by reference to other enactments relating to the same matter or subject—to the same person or thing, or to the same class of persons or things. Familiar illustrations are found in the interpretation and construction of progressive statutes relating to the rights of married women, or to the regulation of the liquor traffic. It is not necessary that one statute thus construed by the aid of another statute should expressly refer to the latter. In the cases of the two enactments of 1852, *supra*, relating to appropriations of property by railroad companies, one in the statute concerning such companies, and the other in the civil code, the construction of the former was aided, in the decisions above cited, by reference to the code provisions for a different method of assessment, approved at a later date, though enacted at the same session.

If, in comparing statutes, we discover the development of a system, and find therein, in a statute which we are seeking to construe, a modification of or addition to the system, having reference to changed conditions, and the adaptation to the system, so far as such changed conditions are concerned, of methods before applicable alone to another system of preëxisting legislation, we may find it reasonable to conclude that the legislature framed such modification or addition with reference to the rules of construction already announced by the courts with regard to such other system, under conditions essentially the same as those contemplated in such modification or addition.

Now, while there are important differences between ordinary commercial railroads and interurban railroads in the appliances and uses now existing, yet in the

4. matter of the appropriation of land for the construction of the ways, and as to the actual methods of construction of the roads through such appropriated lands and the injury thereby caused to the landowner, there is no essential difference. When the legislature in making provision for such new, but essentially identical, conditions, reënacted, with unimportant changes, the terms of the statute relating to such appropriations by "railroad" companies, and thereby applied the methods prescribed for railroad companies to street railroad companies with respect to their interurban railroads, we are of the opinion that the legislature should be regarded as making such adaptation with the intent that the damages to the landowner should be assessed as in case of assessments for the use of railroads under said preëxisting statutes, in the manner and with the limitations recognized by the courts as applicable to such appropriations for "railroads." This seems to be the only reasonable view to take of the matter, and we have already held to this effect, in *Indianapolis, etc., Traction Co. v. Dunn* (1906), *ante*, 248. We have not deemed it necessary to discuss the form of the instructions in question with a view to discriminate between general and special benefits, inasmuch as the statute excludes the consideration of benefits of either kind.

The points and authorities in the appellant's brief relate chiefly to the matter of the consideration of benefits.

The appellant, however, also has presented objec-

5. tions to certain instructions concerning the assessment of damages, because therein the jury were permitted to take into consideration the inconvenience, if it appeared from the evidence, in the tillage, use and occupation of the farm, caused by the construction of the rail-

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road across it; also the annoyance, if any, that might be occasioned to the occupants and owners of this land by reason of the proper operation of this railroad across the farm; also the exposure of the appellee and his family and his stock to injury; also the annoyance, inconvenience and danger, if any, in crossing the railroad from one portion of the farm to another.

The jury were expressly confined to the consideration of such and other matters as shown by the preponderance of the evidence, the burden of proof thereof being

6. stated to be upon the appellee, and were warned that remote, imaginary, uncertain, conjectural and speculative damages could not be allowed, and that the damages must be only such as would compensate the appellee for his actual pecuniary loss. The jury were also confined by the instructions to the consideration of such damages as resulted, or might reasonably result, from the appropriation of a part of the land and the proper construction, maintenance and operation of the railroad thereon. Taking the instructions as a whole, and having regard to the sense in which the several parts must have been taken by the jury, we are unable to pronounce erroneous the portions criticised by appellant. See *Indianapolis, etc., Traction Co. v. Dunn, supra*; *LaFayette Plankroad Co. v. New Albany, etc., R. Co.* (1859), 13 Ind. 90, 92, 74 Am. Dec. 246; *Grand Rapids, etc., R. Co. v. Horn* (1873), 41 Ind. 479; *LaFayette, etc., R. Co. v. Murdock* (1879), 68 Ind. 137; *Chicago, etc., R. Co. v. Hunter* (1891), 128 Ind. 213; *Rehman v. New Albany, etc., R. Co.* (1893), 8 Ind. App. 200; *Chicago, etc., R. Co. v. Patterson* (1901), 26 Ind. App. 295; *Chicago, etc., R. Co. v. Winslow* (1901), 27 Ind. App. 316.

Judgment affirmed.

Roby, C. J., Myers, Robinson and Wiley, JJ., concur.
Comstock, J., absent.

STEMEN ET AL. v. KNUDSON-MERCER COMPANY.

[No. 5,548. Filed February 2, 1906.]

APPEAL AND ERROR. — *Parties.* — *Joint Assignment.* — Where no judgment was rendered either for or against two of the appellants, and the assignment of errors is joint, no question is presented on appeal.

From Huntington Circuit Court; *James C. Branyan*, Judge.

Suit by the Knudson-Mercer Company against Samuel A. Stemen and others. From a decree for plaintiff, defendants appeal. *Appeal dismissed.*

T. G. Smith and *A. G. Johnson*, for appellants.

W. D. Hamer and *W. A. Branyan*, for appellee.

BLACK, P. J.—The brief for the appellants is very imperfect. Many faults in it have been pointed out by the appellee, to notice which would be unprofitable. It is not shown by the brief what supposed errors are assigned and relied upon; but we have looked into the record, and we find that in the title of the assignment of errors Samuel A. Stemen and five other persons and the Michigan Mutual Life Insurance Company are named as the appellants, and the Knudson-Mercer Company is named as the appellee. The alleged errors are assigned by the appellants jointly. In thus designating the appellants, initial letters are inserted in place of a Christian name of one of them.

In the judgment from which the appeal is taken the court awarded costs against the plaintiff (appellee) in favor of four of the seven defendants, including the insurance company, and adjudged that the plaintiff recover from the defendants Samuel A. Stemen and the insurance company, on the first paragraph of the complaint, for a certain sum and costs and for the foreclosure of a mechanic's lien. No judgment appears to have been rendered

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either for or against two of the defendants thus assigning errors jointly with the other defendants, and no judgment was rendered against any of the appellants except as above stated. It is manifest that if there were any errors they could not be available in favor of all of the appellants jointly.

Appeal dismissed.

Roby, C. J., Myers, Robinson and Wiley, J. J., concur.
Comstock, J., absent.

FIFER ET AL. v. RACHELS ET AL.

[No. 5,311. Filed November 28, 1905. Rehearing denied February 2, 1906.]

1. **SPECIFIC PERFORMANCE.**—*Contracts.—Conveyances.—Consideration.—Care and Support.*—Where decedent proposed that if plaintiff would take care of and provide for him during the remainder of his life he would convey to her his farm, and she accepted same, such agreement was founded upon a valuable consideration, and if she faithfully carried out such agreement, specific performance should be decreed. p. 277.
2. **DEEDS.**—*Delivery.—Question for Jury.*—Whether there was a delivery of a deed, which involves an intentional parting with the control over same, is usually a question of fact for the jury. p. 277.
3. **TRIAL.**—*Finding.—Deeds.—Delivery.*—A general finding for plaintiff on a cross-complaint asserting the validity of a deed includes a finding of delivery. p. 277.
4. **APPEAL AND ERROR.**—*Law of the Case.—Evidence.*—Where the evidence in a cause is held insufficient on a prior appeal, such decision is the law of the case on such evidence, but where additional evidence, which is not merely cumulative, is introduced on a subsequent trial such former decision is not the law of the case. p. 277.
5. **DEEDS.**—*Delivery.—Estoppel.—Heirs.*—Where decedent agreed to deliver plaintiff a deed to his farm in consideration of care and maintenance, and plaintiff was led to believe that the deed executed by decedent was held in escrow for her and was to be delivered at her request, such decedent's heirs will be estopped from claiming that there was a failure of delivery, where it is shown that plaintiff in good faith relied thereon and performed her part of the contract. p. 278.

From Posey Circuit Court; *Alexander Gilchrist*, Special Judge.

Suit by Clarence L. Fifer and others against Olive Jane Rachels and others. From a decree for defendants on the cross-complaint, plaintiffs appeal. *Affirmed*.

W. S. Jackson, H. F. Clements, Leroy M. Wade and F. P. Leonard, for appellants.

G. V. Menzies and D. O. Barker, for appellees.

ROBY, J.—A judgment for appellees was heretofore reversed by this court upon the ground that the nondelivery of the deed under which appellees claim was conclusively established by the evidence. *Fifer v. Rachels* (1901), 27 Ind. App. 654. When the case was returned to the trial court, an additional paragraph of cross-complaint was filed by appellee Olive Jane Rachels, in which she averred the making of a contract by decedent in 1886, by the terms of which she and her husband were to move upon and take possession of the real estate in controversy, and board, lodge, care and provide for decedent during his life, in consideration of which he was to convey the land in controversy, in accordance with the terms of the deed, delivery of which is in dispute; that she entered upon the execution of said contract, took possession of said real estate, and in all things complied with her undertaking, and in 1894, pursuant to said agreement, decedent executed a deed to said appellee for said real estate, deposited the same with a third party, and informed her that she could have possession of it at once if she wished. The facts connected with the attempted delivery of said deed are set out, and a decree of specific performance, if said instrument is held invalid, is prayed.

It was said on the former appeal: "the grantor undoubtedly intended that the grantees named in the deed should

have the land," and the evidence establishes the

1. making of the contract and its performance on the part of said appellees. The decedent undoubtedly received a satisfactory consideration, and, in view of his age and dependence, it was probably an adequate one. It follows that the contract should be specifically enforced, if the party has brought herself within the specific rules of law necessary to the procurement of such relief, provided the decedent failed to consummate it.

Whether the deed or other instrument was delivered is a question of fact. *Indiana Trust Co. v. Byram* (1905), 36 Ind. App. 6. To constitute delivery there must

2. have been an intention to part with control over the deed as its owner. *Indiana Trust Co. v. Byram*, *supra*.

The finding of the court carries with it a find-

3. ing that the deed was delivered; such fact being within the issues of the case.

If the evidence upon the second trial was substantially identical with that considered upon the former appeal, the conclusion then reached became, and is now, the

4. the law of the case. *Westfall v. Wait* (1905), 165 Ind. 353. If additional evidence, not merely cumulative, was introduced upon the last trial, then the law of the case is not an applicable doctrine. *Buehner Chair Co. v. Feulner* (1905), 164 Ind. 368. The decision in the prior appeal was that the facts shown were inconsistent with delivery to the third person for said appellee, and that an intention not to part with control over it was made out. *Fifer v. Rachels*, *supra*. In arriving at this conclusion, certain statements made by decedent to others than the person holding the deed or to appellee Olive Jane Rachels, were, together with the indorsement upon the envelope containing said deed and other papers, given controlling weight.

Among other witnesses who testified upon the last trial was Samuel Griffin, seventy-seven years of age, and a long-time, intimate friend of decedent. His testimony

5. was, in part, as follows: "He [decedent] told me what he had done. He said he had made a contract with her, before she had come there, to come there and live with him, keep house for him, and take care of him the balance of his days, and he would deed her a certain piece of land. * * * He said she would not come down unless he had agreed to it. * * * She had filled the bill as well as could be expected. * * * I did not hear any complaints, except he got sick in the meantime with neuralgia. When he got up out of that she told him she was going to move, without him doing something for her. He wanted to know why, and she says: 'If you drop off in one of those spells, we would be kicked out of here by law.' She said: 'I have staid here and taken care of you and all. We haven't accumulated anything, we haint got nothing, and I haint going to stay here unless you fix it up.'" Shortly thereafter decedent went to New Harmony, and the deed in controversy was prepared and deposited at the bank.

Isaac Forbes testified to a subsequent conversation in which decedent said to appellee Olive Jane Rachels: "Well, it's yours. If you want it repaired, repair it; I am about done repairing. Its yours.' She says: 'I haven't got a deed for it.' He says: 'You know where it is. You can go and get it. If you want any repairing done, you can repair it.'"

Another witness testified to a conversation with decedent in the presence of Mrs. Rachels' children. "I spoke about them children being nice children, and he says: 'Yes; I am to start them little fellows out in life in pretty good shape when I leave here.' I says: 'Is that so?' He says: 'Yes; I have deeded to them and their mother this place here.' * * * Mrs. Rachels says:

'Yes; but I have never got my deed yet.' And he says: 'Well, I know you haint, but I told you different times where they are at.' And he says: 'If you don't want to take my word for it you can go to the New Harmony Bank and draw your deed out. If you are afraid I don't tell you the truth, you go there and draw it out.'"

It appears that said appellee continued thereafter to render the service contracted for by her.

Appellants occupy no stronger position than decedent would have done were he himself disputing delivery of the deed. The principle that, for the sake of good faith and fair dealing, a man shall be estopped from showing that to be false which, by his means, has once been accredited as truth, and in reliance upon which others have been thus led to act, may apply to every transaction, the facts of which come within its reason. The fraud against which the law guards is that which would be consummated if such assertion were at a later time allowed. *Anderson v. Hubble* (1882), 93 Ind. 570, 47 Am. Rep. 394.

The averments of the cross-complaint are construed as sufficient to authorize the court to find, as it is presumed to have done, that decedent had, by his declaration and the procurement of services, thereby estopped himself and his heirs from denying the delivery of the deed. *Walker v. Walker* (1866), 42 Ill. 311, 89 Am. Dec. 445; *Bryan v. Wash* (1845), 2 Gilm. (Ill.) 557; *Rodemier v. Brown* (1897), 169 Ill. 347, 357, 48 N. E. 468, 61 Am. St. 176. This conclusion in no way conflicts with any proposition asserted in the former decision. It excludes consideration of questions discussed relative to specific performance.

Judgment affirmed.

MONAGHAN v. CITY OF INDIANAPOLIS ET AL.

[No. 5,761. Filed December 8, 1905. Dissenting opinion January 5, 1906. Transfer denied February 2, 1906.]

1. PATENTS.—*Right to Make, Sell and Use.*—*Presumption.*—The presumption, in the absence of a showing to the contrary, is, that the patentee has the exclusive right to make, sell and use the patented article during the term of the patent. p. 284.
2. MUNICIPAL CORPORATIONS.—*Pavements.*—*Patents.*—*Competitive Bidding.*—Where one person has the exclusive right to make, sell and use a patented pavement, there can not be “competitive bidding” for a contract to use such patented article. p. 285.
3. SAME. — *Streets.* — *Construction.*—*Statutes.*—*Mandatory.*—It has been the settled purpose in this State to let contracts for the construction of streets to the lowest and best bidder when the cost thereof was chargeable to the property owners, and the provisions of the statutes relating thereto are mandatory. p. 285.
- 4 SAME. — *Streets.*—*Construction.*—*Statutes.*—*Patents.*—While it will be presumed that officers will do their duty, still, where a municipal corporation has not the power to contract for a patented pavement because competitive bidding can not be had thereon, such corporation's compliance with all of the other provisions of the statutes relating thereto does not avail to make such contract valid. p. 286.
5. SAME. — *Streets.* — *Construction.* — *Statutes.* — *Provisions.* — Where a statute giving a municipal corporation the power to construct streets at the expense of the frontagers provides for competitive bidding, it impliedly excludes the use of a patented pavement on which there can be no competitive bidding. p. 286.
6. SAME.—*Streets.*—*Construction.*—*Competition.*—A municipal corporation has no power to contract for the use of a pavement, the materials of which are under the control of one person, whether such materials be patented or not, where the law requires competitive bidding. p. 287.
7. SAME. — *Streets.* — *Construction.* — *Right of Frontagers to Select Kind.*—Where a statute gives frontagers the right to select “of the accepted kinds of modern city improvement” the kind of pavement they desire they can not select a patented pavement on which there can be no competitive bidding, the statute requiring competitive bidding. p. 288.

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8. **MUNICIPAL CORPORATIONS.—Streets.—Construction.—Competitive Bidding.—Waiver.**—Where a statute requires competitive bidding in the construction of streets, a municipal corporation can not waive such provision, nor can a majority of the frontagers, although such statute gives such majority the right to make their selection of the kind of pavement from “the accepted kinds of modern city improvement.” p. 288.
9. **SAME.—Streets.—Construction.—Frontagers’ Expense.**—In deciding that a municipal corporation can not let a contract, at the frontagers’ expense, for the construction of a street made by the use of a patented pavement, on which there can be no competitive bidding, the statute requiring such bidding, the court does not hold that such municipal corporation can not, acting for itself, use patented articles for municipal purposes. p. 290.
10. **SAME.—Streets.—Construction.—Statutes.—Right to Bid.**—Where a statute requires competitive bidding for the construction of streets, outsiders have no “right” to bid, within the meaning of such statute, where such streets are to be made from patented material and one person owns the exclusive right to make and use same. p. 291.
11. **PATENTS.—Right to Sell.—Terms.—Presumption.**—It will not be presumed that a patentee will sell the right to use the patented article to all people on equal terms or on any terms. p. 292.
12. **MUNICIPAL CORPORATIONS.—Streets.—Construction.—Patents.—Use of.—Restrictions.—Competition.**—Where the patentee of a pavement granted to all the right, at a certain price, to use his pavement, reserving to himself the right to decide whether the user was capable and competent to do the work, there can be no competitive bidding for the construction of a street, such patentee virtually reserving the right to choose the bidder. p. 293.
13. **SAME.—Streets.—Construction.—Patents.—Market Price.**—Where the patentee has established a regular market price for his patented pavement, or he relinquishes his right to use the patent and places bidders on equal terms, municipal corporations can contract for the use of such patented pavement in the construction of its streets. p. 293.

From Superior Court of Marion County (69,271);
James M. Leathers, Judge.

Suit by John Monaghan against the City of Indianapolis and others. From a decree for defendants, plaintiff appeals.
Reversed.

J. E. Bell, for appellant.

Henry Warrum, Edward E. Raub, F. Winter and Elliott, Elliott & Littleton, for appellees.

John R. Wilson and William A. Ketcham, amici curiae.

ROBINSON, J.—Suit by appellant, an abutting property owner, to enjoin the letting of a contract for a street improvement.

The complaint avers that the city's board of public works adopted a resolution for the improvement of the street by paving with brick; that afterward, upon the petition of a majority of the resident freeholders on the street sought to be improved, the resolution, plans and specifications were modified so as to provide Warren's patent bitulithic pavement. The resolution, modification and detailed specifications are set out in the complaint. It is also averred that all the steps preliminary to the letting of the contract have been duly taken; that the board advertised for bids, and threatens to and will, unless enjoined, let the contract and have the work done, to the irreparable injury of appellant. It is further averred that the pavement specified is a patented pavement covered by letters patent of the United States; that there can be no competition in such work, and that an unlawful monopoly is necessarily created by making such improvement with a patented pavement; that there was no necessity for its selection by the board, for the reason that there are many other as good and durable modern first-class accepted pavements not covered by patent, and not controlled by any monopoly; that the cost of the improvement will be greatly increased by the use of such patented pavement, and appellant's property assessed for more than it will be if competition is had.

Appellees answered, alleging that the resolution was modified upon the petition of a majority of the property owners; that the pavement in question is one of the accepted modern city pavements, and has been laid in many cities of this and other states; that its cost is approximately the same

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as other bituminous or asphalt pavements, and practically no more; that the specifications call the attention of bidders to the fact that the city engineer will furnish, upon request, to any bidder, a copy of a proposal from the company owning the patent, stating at what price it will furnish the same. A copy of this proposal or agreement is made a part of the answer, and, among other things, provides that the company agrees "to furnish to any contractor to whom a contract is awarded to pave a street or streets in the city of Indianapolis with Warren's bitulithic pavement, during the year 1905, and who shall enter into such contract with such sureties as may be provided by law and by said city, who is equipped or shall equip himself with the necessary appliances purchasable in the open market for preparing and laying such pavement, all the necessary compounds, to prepare and lay such pavement, according to standard specifications for such work, for the sum of ninety cents per square yard for such pavement; said pavement to have a ——— inch foundation and a two-inch top, and said compounds to be as follows: [Specifying the different compounds]. In addition to the above we hereby propose and agree to allow the contractor to use our patented processes for laying our pavement, and to furnish an expert who will advise in the laying of the pavement without extra charge." It is further alleged that competition in bidding is thus provided; that appellees are informed and believe and allege that competitive bids will be submitted for the improvement; that they have the right to have the street improved with a patented pavement, even though there could be no competition. A demurrer to this answer was overruled, and, upon appellant's refusal to plead further, judgment was rendered in appellees' favor.

Section ninety-five of the act of March 6, 1905 (Acts 1905, pp. 219, 281, §3519 Burns 1905), provides: "Such board shall * * * let such contract to the lowest and best bidder." Section 107 of said act (Acts 1905, pp. 219,

286, §3531 Burns 1905) provides: "If * * * there shall have been filed * * * a petition * * * in writing, of a majority in number of resident freeholders upon such street * * * sought to be improved, requesting that said street * * * be paved with any certain kind of the accepted kinds of modern city pavement, then the board * * * shall not have the power or authority to pave said street * * * with another kind of material, unless the same is specifically ordered by an ordinance passed by a two-thirds vote of the council of such city. If such original resolution be confirmed or modified, it shall be final and conclusive on all persons, unless, within ten days thereafter, a majority of the resident freeholders upon such street * * * remonstrate against such improvement."

(1) The question presented by the complaint may be briefly stated thus: Does an improvement which is covered by letters patent permit the competition provided for by section ninety-five, *supra*? If this question is answered in the affirmative, it is unnecessary to consider any question raised by the answer, for the reason that if there may be competitive bidding for a pavement covered by letters patent, the complaint is bad.

The complaint alleges that the bitulithic pavement in question is a patented pavement covered by letters patent of the United States. From the nature of letters

1. patent the presumption prevails, until the contrary is shown, that the patentee has the exclusive right to make and use, and sell to others to be used, the thing patented during the term for which the exclusive right is granted. "Letters patent," said the court in *Seymour v. Osborne* (1870), 11 Wall. 516, 20 L. Ed. 33, "are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful

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improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of congress."

If it is proposed to put down a patented pavement, and the patentee has "the exclusive right and liberty to make and use and vend to others to be used" this patented

2. pavement—and under the above definition of a patent this is the case made by the complaint—we fail to see any reasoning upon which to base the statement that there could be competitive bidding as required by the statute. If the patentee controls and retains absolutely the right to use and to sell to others the patented article, so long as he retains this right there could be no competitive bidding for a contract to use the patented article.

In all the legislation in this State since 1852 touching street improvements, provision has always been made for competitive bidding. From 1852 to 1891 the con-

3. tract was to be let to the "best bidder," and from 1891 to 1905 to "the lowest and best bidder." The one important fact has been kept in view through all this legislation—that competition is safe and is in the interest of the property owner. The legislature has delegated to the municipality, through its board of public works, the power to charge the property of individuals with the expense of the improvement, and it has been held time and again that the steps to be taken in fixing this assessment are mandatory and are to be strictly pursued. The property owner may insist upon the observance of every requirement that will in the least tend to protection. "It is, however, the duty of the courts to resolve doubts against the validity

of the exercise of the authority wherever there is any substantial deviation at all, and to sustain proceedings in cases where there is not an exact compliance with the statute only when it clearly and unmistakably appears that no possible injury has resulted to the landowner, or could result to him.' ” *Wickwire v. City of Elkhart* (1896), 144 Ind. 305. See, also, *City of Bluffton v. Miller* (1904), 33 Ind. App. 521, and cases cited.

It is quite true it will be presumed that public officers will do their duty, and let it be presumed that if there is but one bid, and it is exorbitant or unreasonable,

4. the board will reject it. But it is not a question of good faith or bad faith, or the exercise of a sound discretion, on the part of the municipal officers. It is simply a question of power. What does the statute say they shall do, and have they done it? It is true, as argued, that the statute safeguards the property owners and municipality in various ways;—by stipulating that no contract shall be let which shall be more than ten per cent in excess of the engineer's estimate, nor where the total cost exceeds fifty per cent of the aggregate value of the property as it is assessed for taxation, and the right of the board to reject any and all bids. But are these provisions any more important as safeguards than the provision for competitive bidding? Can any reason be given for ignoring one and observing another? The statute does not expressly exclude patented pavements, but if the use of a patented pavement wholly nullifies the provision for competitive bidding, it is impliedly excluded. If the patented pavement can not be used without disregarding the provision for competitive bidding, its use is as clearly prohibited as it would have been had the statute so stated.

It can not be said that this construction is importing a new term into the statute, that it reads into the statute an additional provision to the effect that a street shall

5. not be improved with a patented pavement. Such a construction does impliedly exclude a patented

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article, not because it is a patent, but because of conditions necessarily created and existing under which competitive bidding could not be had. The effect of the construction that should obtain is that these conditions can not be permitted if they result in nullifying a positive statutory provision inserted for the protection and security of the property holder.

It must be admitted that the same reasoning that excludes a patented pavement would exclude a pavement not patented, but which is owned and controlled by a

6. single individual. No logical reason can be given for saying that there could not be competitive bidding for a patented pavement, and that there could be competitive bidding for a pavement not patented, but monopolized by a company or individual. If the owner of the pavement sought to be used has and retains "the exclusive right and liberty to make and use and vend to others to be used" what is desired, what possible difference can it make, so far as it affects the question here considered, whether this exclusive privilege is because of a patent or because of circumstances? And when it is said, as it is in the argument, that the rule deprives municipalities of the use of such patented articles, no difference how beneficial they may be to the public, and that where the best interests of the municipality will be subserved by the use of a patented article the provision for competitive bidding has no application, then it must also be said that this provision has no application if the best interests of the municipality will be served by the use of an article controlled absolutely by a single individual. The result of this reasoning must necessarily be that in any case the provision for competitive bidding may be nullified or ignored if the best interests of the municipality in the particular case will be subserved by so doing.

Much stress is placed, in argument, upon the fact that a majority of the resident property owners petitioned for the

pavement in question under that provision giving

7. them the right to designate a certain kind "of the accepted kinds of modern city improvement." This is a comparatively new provision in street improvement statutes, and gives a right not heretofore generally granted. But we can not conclude that it was the intention of the legislature that competitive bidding would not be required in cases where this right is exercised. The provision for competitive bidding inures to the benefit of all property owners subject to assessment, whether residing upon the street to be improved or not. The persons most interested in the improvement are those who must pay for it. If this petition may nullify the provision for competitive bidding, a substantial right given to a very large majority of property owners subject to assessment may be taken from them by a very small minority. We are not questioning the wisdom or propriety of giving extraordinary power to a majority of those residing on the street. That is a matter exclusively for the legislature. But this power can not be said to be of any more importance than the safeguards provided for the protection of the majority; and, considering the basis upon which rests the doctrine that a municipality may put the cost of a public street improvement upon the owners of abutting property, we can not agree that the legislature intended that this petition should take out of the statute a safeguard which, through all the legislation on the subject, has been provided for the sole benefit of those who must bear the burden of the improvement. This provision can not be waived by the board of public works,

8. nor do we see any reason for saying that a majority in number of resident freeholders upon the street to be improved may waive it. And while the original improvement resolution, providing that the street should be paved with brick, was, upon petition of a majority of the resident property owners, modified so as to provide for Warren's patent bitulithic pavement, the board was still

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required by the charter to let the contract for the improvement, if let at all, to the lowest and best bidder. So that the fact that the board adopted the kind of improvement petitioned for by a majority of the resident property owners does not make the case in any respects different from what it would have been had the board in the original improvement resolution specified the bitulithic pavement instead of brick. If a contract is let it must be to the lowest and best bidder, whether the board in the first instance designated the kind of improvement or afterward selected the kind petitioned for by a majority of the resident property owners.

Upon the question above considered, the courts are not agreed. The case of *Hobart v. City of Detroit* (1868), 17 Mich. *246, 97 Am. Dec. 185, decides the question in the affirmative, and the case of *Dean v. Charlton* (1869), 23 Wis. 590, 99 Am. Dec. 205, decides the same question in the negative. These two cases were the pioneer cases on the subject. Upon the precise question presented by the complaint in the case at bar neither of these cases has been disapproved or modified in the respective jurisdictions in which decided. In a subsequent case (*Kilvington v. City of Superior* [1892], 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45), the Wisconsin court did not disapprove *Dean v. Charlton, supra*, but declined "to extend the rule of that case beyond the particular point there decided." The courts in other jurisdictions are not agreed upon the question, but the better reasoning will be found underlying the rule declared by the Wisconsin court.

The doctrine of *Hobart v. City of Detroit, supra*, is followed in *Holmes v. Common Council* (1899), 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. 587; *Barber Asphalt Pav. Co. v. Hunt* (1889), 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. 530; *In re Petition of Dugro* (1872), 50 N. Y. 513; *Yarnold v. City of Lawrence* (1875), 15 Kan. 126; *Verdin v. City of St. Louis*

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(1895), 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Swift v. City of St. Louis* (1904), 180 Mo. 80, 79 S. W. 172. See, also, *Rhodes v. Board, etc.* (1897), 10 Colo. App. 99, 49 Pac. 430; *Mayor, etc., v. Raymo* (1888), 68 Md. 579, 13 Atl. 383. If there is no distinction, so far as competitive bidding is concerned, between a monopoly existing by reason of a patent and one existing not by reason of a patent, but by reason of circumstances, and we can see no reason for a distinction, it would seem that the later case of *Smith v. Syracuse Improv. Co.* (1900), 161 N. Y. 484, 55 N. E. 1077, is in direct conflict with the earlier decisions in that state. The doctrine of *Dean v. Charlton, supra*, is followed in *Nicolson Pav. Co. v. Painter* (1868), 35 Cal. 699; *State v. City of Elizabeth* (1872), 35 N. J. L. 351; *Burgess v. City of Jefferson* (1869), 21 La. Ann. 143; *Fishburn v. City of Chicago* (1898), 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. 236; *Fineran v. Central, etc., Pav. Co.* (1903), 116 Ky. 495, 76 S. W. 415. See, also, *Perine, etc., Pav. Co. v. Quackenbush* (1894), 104 Cal. 684, 38 Pac. 533. In *Newark v. Bonnell* (1894), 57 N. J. L. 424, 31 Atl. 408, 51 Am. St. 609, it is said: "The case of *State v. City of Elizabeth* [1872], 35 N. J. L. 351, is not in point, and does not decide the proposition stated in the syllabus." See, also, *Ryan v. Patterson* (1901), 66 N. J. L. 533, 49 Atl. 587.

The cases of *Beazley v. Kennedy* (1899), (Tenn.), 52 S. W. 791, *Silsby Mfg. Co. v. Allentown* (1893), 153 Pa. St. 319, 26 Atl. 646, and *Baird v. Mayor, etc.* (1884), 96 N. Y. 567, involved the right of the municipality to purchase patented or monopolized articles for municipal uses.

As the question here presented involves the power of the municipality to charge the property of certain individuals with the cost of a public improvement, it seems

9. foreign to the question to consider whether the municipality acting for itself may not buy or make use of patented articles for its municipal purposes. A public

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street improved at the expense of abutting property owners, and assuming to benefit the abutting property to the extent of the charge imposed upon it, is, to an extent, an improvement for the benefit of the inhabitants of the municipality not different from the public benefit resulting from the purchase of articles for municipal use. The distinction between such contracts is well defined in *Kilvington v. City of Superior*, *supra*, and *Burgess v. City of Jefferson*, *supra*.

In *Hobart v. City of Detroit*, *supra*, a lot owner sued to enjoin the collection of a tax levied to pay the expense of paving the street with the Nicolson pavement—patented—alleging that the contract for the pavement was illegal. The city charter provided that no such contract should be let “except to and with the lowest responsible bidder.” The right to lay the pavement was owned exclusively by Smith, Cook & Co., the contractors, who alone, therefore, it is claimed, could and did bid for the contract, and, there being no possibility of a competitor, the contract was awarded to them on their own terms; and this exclusive right precluded the application of this charter provision. Upon the question of whether there should be competitive bidding in such a case the court said: “But it is not, I apprehend, strictly correct to say that because the patented invention which must be made use of is owned by one person exclusively, therefore, no one else can be a bidder. Every one has a right to bid, and to take upon himself the risk of being able to procure the right to make use of the invention.”

But if the patentee holds the exclusive right to use and to sell the article, and from the nature of a patent he holds that right, does not a choice of the patented improve-

10. ment amount practically to a choice of the contractor? Of what consequence is a right to bid when there is no chance for competition? The patentee may sell or may refuse to sell to anyone the right to use the article, and we fail to see how there could be any competition in

the use of a needed article between two persons, one of whom neither owns nor is able to procure the thing needed, and the other of whom absolutely owns and controls the use and sale of the thing needed. Moreover, the statute (Acts 1905, pp. 219, 281, §95, §3519 Burns 1905) provides: "The board may by order impose further conditions upon bidders with regard to bond and surety, guaranteeing the good faith and responsibility of such bidders." It does not appear in this case whether the board imposed this condition upon bidders, but it is not material, in construing the act, whether it did or did not, as the section must be construed as a whole. If it be conceded that the fact that every one has a right to bid and take upon himself the risk of procuring the right to use the article satisfies the requirements of the statute as to competitive bidding, then it must be conceded that this right to bid, in a case where the board has exacted of each bidder a bond guaranteeing his good faith, also satisfies the requirements of the statute.

In *Hobart v. City of Detroit*, *supra*, it is further said: "If that firm held the privilege of putting down the pavement for sale at a regular price per square foot or yard, the opportunity to bid for a public contract would be as much open to public competition as for any other work requiring skilled labor. For aught we know, this was the case; and we may well take notice of the fact that it is frequently by thus selling the 'royalty' that the owners of new inventions expect to obtain their reward."

If in that case the firm did in fact hold the right to put down the pavement for sale at a regular price, then the question there presented is not the same we are now

11. considering. That opinion does not say that it would be presumed that the firm held the right for sale at a regular price. Nor will such a presumption be indulged. The patent laws may contemplate that the patented article will be offered to the public on equal terms, but the patentee is not required to do so, nor is he required

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to offer the article to the public on any terms. So long as he retains the exclusive right to use and sell the article, he has a rigid monopoly, and bidding under such a condition would be no more than a mere form.

(2) It remains to consider the effect of the proposal pleaded in the answer. Does the proposition made by the patentee, relative to the use of the patented article,

12. place all bidders on equal terms and remove the objection to its use? We think not. Without this proposition, we have already concluded that the patentee could absolutely control the bidding, and with such control there could be no competitive bidding except in name. In the proposition made, aside from its sufficiency or insufficiency in any other respect, the patentee has the power to determine indirectly, but effectively, to whom the contract shall be awarded, by reserving to himself the right to determine arbitrarily who is equipped with the necessary appliances for laying the pavement. The statutory safeguard for full and free competition, or the possibility for such, is not preserved with this reservation in the grantee. When the patentee, although granting the right to use the patent, reserves a right by which he may determine arbitrarily who shall have the contract, he has not, so far as competition among bidders is concerned, conceded anything.

We quite agree with counsel that municipalities should not be deprived of the right to use improved methods in street paving because the process or material is

13. patented or is in control of a single individual. And they need not be deprived of this power. The patentee may relinquish his right to use the patented article and place bidders upon even terms by giving them an opportunity to purchase the article or process at its value. It is for the patentee to determine whether the right to use the article, or "royalty, shall acquire a sort of market value which becomes well understood and all persons have the

benefit of such market value." *Hobart v. City of Detroit, supra*. Whether the improvement to be made shall be expensive or inexpensive must be determined by the municipal officers under the limitations prescribed in the charter. The specifications filed with the pleadings show that the patent here in question applies to a part of the improvement. The specifications provide that a subgrade shall be prepared, and upon this shall be placed a concrete foundation made in accordance with general specifications for concrete. Upon this concrete foundation is to be placed the pavement in question. Suppose a part or all of the ingredients, none of which are patented, entering into this concrete foundation are in the control of a single individual, but have a fixed price, or market value, at which they must be purchased, if purchased and used at all, and that the city's board of works knows that fact, but that such ingredients could be purchased by any one desiring to purchase them, could it be said that the board could not let the contract because there could be no competitive bidding? We think not.

In *Hastings v. Columbus* (1885), 42 Ohio St. 585, suit was brought against the city and certain lot owners seeking to charge the lot owners with the cost of a patented pavement. The court said: "Objection is made that each of these improvements required a species of pavement which was patented; that the contractors, in each case, owned the patent; and hence that there was no competition, and defendants can not be assessed. But in each case, before there was any letting, the city had acquired the right to secure, at a reasonable cost, the right of such patent, with respect to this improvement, for any successful bidder for the work, and the bidders were placed by the city, in this respect, substantially on equal terms. We think the objection untenable." The character of the agreement with the city referred to in this case does not appear, but it would not be material whether the city purchased the right to use

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the patent or the patentee relinquished the right, provided all bidders were placed upon equal terms and given opportunity to purchase the article at its value.

The question decided in *Kilvington v. City of Superior* (1892), 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45, is unlike the question presented by the answer in the case at bar in two respects: (a) The improvement was made at the expense of the municipality; and (b) the patentee, without any reservation, relinquished to any contractor who took the contract the right to use the patent at a fixed sum.

We think the rule should be that where the patentee retains the exclusive right to use and to sell to be used by others the patented pavement, and he has this right as a patentee, a contract for such pavement to be paid for by abutting property owners cannot be entered into, for the reason that in such case competitive bidding within the plain intent and meaning of the statute cannot be had. But this rule should not and does not exclude the use of a patented pavement. We are not required in this case to indicate the manner in which it may be done, but upon the showing made by the answer, for the reasons given, there could not be the competitive bidding the statute requires. The demurrer to the answer should have been sustained.

Judgment reversed.

Roby, C. J., Myers and Comstock, J.J., concur. Black, P. J., concurs in result. Wiley, J., dissents.

DISSENTING OPINION.

WILEY, J.—I can not concur in the conclusion announced in the prevailing opinion, nor in the reasoning leading to that conclusion. The rights of the parties must be determined by applying the law to the facts as they are exhibited by the pleadings in this particular case. I am unable to assent to the doctrine that because the process for paving Northwestern avenue, adopted by the board upon the petition of a majority of the property owners, happens

to be a patented process, and that process is owned and controlled by a single firm or corporation, under the facts pleaded there can be no competitive bidding, and hence, for that reason, a valid contract be entered into.

The conclusion reached in the prevailing opinion involves and decides two important propositions: (1) That a patented pavement may be contracted for and used, and abutting property assessed in payment thereof. (2) That where the patentee retains the exclusive right to use and to sell, to be used by others, the patented process, a contract for such pavement, to be paid for by assessments against the abutting property, cannot be entered into, because in such case competitive bidding, within the plain intent and meaning of the statutes governing the city of Indianapolis, can not be had.

The latter proposition is inconsistent with the former, for the reason that the value of a patent is the exclusive right which the patentee or owner possesses to use and control it. If he yields that right the value of his patent is destroyed.

The two propositions are inconsistent for another reason, which is apparent from a statement in the opinion. It is said "that if there may be competitive bidding for a pavement covered by letters patent, the complaint is bad."

The ruling that a patented pavement may be used includes the primary rule which requires competitive bidding, for it is upon that rule that a valid contract may be entered into. If my associates are right, there can be no competitive bidding where the patentee owns and controls the patent, even though he yields to all bidders the right to use it upon equal terms. So the vital question here is: Do the facts pleaded preclude competition in bidding for the proposed improvement? If they do, then the judgment pronounced on appeal is correct. I affirm, however, that this inquiry should be answered in the negative.

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There are statutory provisions and facts present in this case that do not appear in any of the decided cases, and, to my mind, they are of controlling importance. This is a pioneer case, so far as I am able to learn, where a majority of the abutting property owners are given, as an absolute statutory right, a voice as to the particular kind of pavement they desire, and where the municipal authority is prohibited from proceeding with the improvement against the expressed wish of such owners.

Upon the former hearing of this case the sufficiency of the complaint was not considered. As it is now ruled by the majority opinion that a patented pavement may be used, the complaint in this case is fatally defective, unless it affirmatively appears from the facts pleaded that there can be no competition in bidding for the work. The holding that a valid contract for the construction of a pavement covered by a patent may be made embraces the concession that competitive bidding may be had. Therefore, under the rule declared, it necessarily, reasonably and logically follows that because a patented pavement is adopted competitive bidding may be had. What is there in the complaint upon which the court can declare as a rule of law that competitive bidding is stifled, and enjoin the board of public works from proceeding to let the contract? It must affirmatively appear from the complaint that there can be no competition, or the complaint is bad. The only averment I can find that pertains to this particular question is the following: "That said bitulithic pavement provided for in said resolution, for which said contract will be let, and with which said improvement will be made, unless an injunction is granted, is a patented pavement covered by letters patent of the United States; that there is no authority for improving streets in said city with a patented pavement, and that there can be no competition in such work, and an unlawful monopoly is necessarily created by making such improvement with a patented pavement."

The complaint is held good upon the presumption "that the patentee has exclusive right to make and use and sell to others to be used the thing patented during the term for which the exclusive right is granted." Presumptions are not indulged in favor of, but rather against, a pleading. The facts stated must make a case in law. The naked averments that the proposed improvement is a patented process, that there can be no competition in such work, and that an unlawful monopoly is created, are mere conclusions of the pleader, and not statements of issuable facts. As the statute provides for competitive bidding, that the contract shall be let to the lowest and best bidder, and that it must be let within certain limits as to cost, the reasonable and legal presumption that necessarily follows would be that the board of public works, in the exercise of its statutory power, will discharge its duties according to law, and will not let the contract, unless it shall appear that there is present free and open competition, and the right to use the patented process is open to all bidders alike.

It is conceded that there must be competition, and it is also conceded that a valid contract for improving a street with a patented pavement may be made. This being true, I am unable to see how my associates arrived at the conclusion that from the facts stated in the complaint there could be no competition, and hence the complaint held good.

With the concession that the mere fact that the proposed improvement was covered by a patent does not prevent competition, and indulging the presumption that the board of public works would discharge its duty according to law, there can be no presumption that a contract would have been let without competition. Under the reasoning in the case of *Hobart v. City of Detroit* (1868), 17 Mich. *246, 97 Am. Dec. 185, and all the cases following the rule there declared (I will advert to them later), it should be presumed that the patented pavement can be procured in the open market, or that the patentee will grant to any suc-

cessful bidder the right to use the patented process. In such cases all bidders would be upon an equality, and this of itself would produce and encourage competition. This being true, the conclusion necessarily follows that, there being no facts pleaded from which it can be deduced as a matter of law that competition is stifled, the complaint fails to state facts entitling appellant to equitable relief.

In legal effect, as touching the question of competition, there can be no difference between a patent and a natural monopoly. Neither of them is illegal, as I will attempt to show later in this opinion. If the presumption is that a patented article or a natural monopoly may be obtained from the owner so there may be competition in bidding, and I think this is a reasonable presumption, then the complaint is bad, because there are no affirmative allegations showing that there can be no competition. A single illustration will demonstrate the force of the proposition.

Suppose a gravel road is to be constructed. There is but one gravel bed within reasonable contiguity to the road, and such gravel bed is owned and controlled by one man. There is a fixed and known price at which the gravel may be purchased, and without it can be procured the improvement can not be made. Suppose the petition for the improvement has been granted, the specifications have been adopted, and advertisement made for bids. A property owner whose land is liable to assessment brings a suit to enjoin the letting of a contract, and bases his right for equitable relief upon the fact that the gravel is owned by one man; that it can only be procured from him; that it is a natural monopoly; and avers that "there can be no competition for such work." Under such facts would any court hold his complaint good, and grant him the relief asked? I think not, and yet the illustration presents the same case in principle as the complaint at bar.

Here it is sought to enjoin the use of a patented process because there can be no competition, while in the illustra-

tion relief is sought because of a natural monopoly which excludes the principle of competition as effectually as a patent. If the presumption prevails that the patented article or the natural monopolized article can not be obtained upon equal terms by all bidders, I can not see how "any certain kind of the accepted kinds of modern city pavement" can be utilized, for they are all covered by patents or controlled by monopolies.

In view of the fact that the legislature has conferred upon property owners the right to designate, by petition, the kind of pavement they desire, provided it is of the modern, accepted kind, and in view of the fact that the board of public works is prohibited from proceeding with the improvement by the construction of any other kind of a pavement, it occurs to me that the prevailing opinion establishes a precedent, by which all street improvements could be blocked.

The statute declares that the contract for the improvement must be let to the lowest and best bidder. As to who is the lowest and best bidder is a question for the board of public works, and not a question for the courts. Its determination of that question, in the absence of fraud, is final, and such letting presupposes that there will be competitive bidding.

For the reasons stated, I think the complaint is bad. This being true, if the answer is bad, as declared in the majority opinion, it is good enough for a bad complaint, and the demurrer to it should have been carried back and sustained to the complaint. In my judgment the facts pleaded in the answer constitute a complete defense in bar to the complaint, and my associates have not correctly construed all of the terms and conditions of the agreement of the owners of the patented process, filed with the board, and upon which the answer is partly based. The facts pleaded, both in the complaint and answer, are so fully stated in the majority opinion that it is unnecessary for me to restate them here.

The board of public works is clothed with legislative authority to improve and pave streets, and it derives all of its power from that source. Beyond that authority it can not lawfully go. Within that authority it is the sole arbiter. It is required to conform to the mode prescribed by statute conferring such power. This serves only as a limitation upon the exercise of the power. When the board of public works, which is the authorized agent of the city, proceeds in the way prescribed by statute, it may lawfully use the whole power conferred upon it. The limitation is not upon the power but upon the exercise of it. So far as I know, the universal rule for the improvement of streets is to provide for paying the cost thereof by assessments on the abutting lots. Without at this time quoting the statute in detail, it is made imperative that proposals for bids upon adopted specifications must be advertised for, and that the contract for the improvement shall be let to the lowest and best bidder. There is no mandatory provision of the statute which requires the board to let the contract to the lowest and best bidder. The board is to be the sole judge as to whether any bid or bids is or are reasonable, and if in its judgment the bids are unreasonable all of them may be rejected, and it can not be required to enter into a contract.

In the improvement of a public street there are elements of labor, skill, etc., which enter into it, other than the material with which it is finished and surfaced. It is conceded in this case that any bidder who may procure the contract for the improvement of the street in question can obtain from the patentee the right to use the patented process, at a fixed price per square yard. This opens the door to all bidders, and they stand upon an equality in that regard. The work of grading the street and preparing it for the patented process, as well as all incidental work, is open to all bidders. The work, labor and skill required to place the patented process upon the prepared grade is also open to competition. Every step in the progress of the work,

from its inception to its finish, is open to competitive bidders, except the patented process, controlled by the Warren Brothers' Company, and the right to use that process, and the material of which it is composed, is also open alike to all. No presumption can be indulged because the board of public works decided, upon petition of a majority in number of the abutting property owners, to improve the street with "Warren's patent bitulithic pavement," and that that particular patent is owned and controlled by the Warren Brothers' Company, and which said company agreed to furnish to any and all bidders "the necessary compounds to prepare and lay such pavement" for ninety cents per square yard, that there can be no competitive bidding for such work. The right to use "the necessary compounds to prepare and lay such pavement," at a fixed price, is not prohibitive of competitive bidding, except as to the cost of the "compounds." One bidder, being better equipped to lay the pavement than another, might well be able to perform the work cheaper than another competitor; or one bidder who was no better equipped than another might be willing to do the work cheaper, and still do it at a profit. The mere cost of the material can not be the criterion by which to determine the question of competition.

The standard cements used in the construction of sidewalks, asphalt pavements, etc., have a fixed commercial value that can be procured alike by all purchasers. Yet, because of such fact, competition is not destroyed, where such products are used in public works and enterprises. The elements of labor, conditions, facilities, etc., must all be considered, for they all enter into the question under consideration.

I am firmly convinced that where a street is to be improved, and the proper authority, as in this case, decides, upon the petition of the majority in number of the abutting property owners, the kind of improvement to be made, and though the improvement provides for a pavement which

can only be constructed under a patented process, and the purchase of "the necessary compounds to prepare and lay such pavement" is open alike to any and all bidders, as here, that a valid contract may be entered into for the construction of such pavement, and that the essential element of competitive bidding is not destroyed under the facts disclosed by the record. With these observations I will proceed to a brief review of the statute and authorities. A part of §107 of the act approved March 6, 1905 (Acts 1905, pp. 219, 286, §3531 Burns 1905), reads as follows: "Provided, however, that if at any time between the date of the adoption of the resolution and the day appointed for modifying, confirming or rescinding said resolution, there shall have been filed in the office of the said board of public works a petition or petitions in writing, of a majority in number of resident freeholders upon such street or alley sought to be improved, requesting that said street or alley be paved with any certain kind of the accepted kinds of modern city pavement, then the board of public works shall not have the power or authority to pave said street or alley, or any part thereof, with another kind of material, unless the same is specifically ordered by an ordinance passed by a two-thirds vote of the council of said city. If such original resolution be confirmed or modified, it shall be final and conclusive on all persons, unless, within ten days thereafter, a majority of the resident freeholders upon such street or alley, or proposed improvement, remonstrate against such improvement." The expression "with any certain kind of the accepted kinds of modern city pavement," as it appears in the statute, does not in terms or by implication exclude patented pavements. We must presume that the legislature used the expression advisedly, and if it had been intended to exclude the use of a patented pavement it would so have expressed such intention.

It is averred in the answer that the pavement ordered by the modification of the original resolution is an accepted

kind of modern city pavement. This tenders an issuable fact, and the truth of that fact is admitted by the demurrer. The statute just quoted injects into this case an important element that is not found in any of the decided cases where the point in issue has been involved. Where a majority of the resident freeholders on the street file a petition asking that the improvement be made by putting down a specified particular kind of "modern city pavement," the board is deprived of all power or authority to make the improvement with any other kind of pavement, except it is ordered to do so by an ordinance passed by a two-thirds vote of the city council. The council can override and strike down the will of the property owners, but the board is powerless to do so.

Another element brought into this case by the statute, which was not present in any of the decided cases, is that when the original resolution shall have been confirmed or modified, "it shall be final and conclusive on all persons, unless, within ten days thereafter, a majority of the resident freeholders on such street * * * remonstrate against such improvement." The statute confers upon the majority of the resident lot owners the right to select the kind of a pavement to be used, and for which their property is to be assessed for payment. When they have exercised that right, as provided by statute, the board of public works is shorn of its power to order any other kind of an improvement. The legislature certainly had the right to let the resident freeholders have a patented pavement, if they wanted it, if they should bring themselves within the provisions of the statute. Certain it is that there is nothing in the statute which even remotely or impliedly excludes such pavement.

All that is required by the statute is that after the resident freeholders have made their selection, the board must, upon proper notice, invite bids. If there is more than one bidder, then there is competition, except in the case of fraud

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or collusion, and the statute provides against that. If there is but one bidder, it may be presumed that he has been induced to bid with the fact in view that if his bid is exorbitant or unreasonable the board will reject it.

The statute safeguards the property owners and municipality in various ways. Thus it is provided that no contract shall be let which shall be more than ten per cent in excess of the estimate of the engineer, nor where the total cost of the improvement shall exceed fifty per cent of the aggregate value of the property to be assessed. Also that the board may, and in this case does, reserve the right to reject any and all bids. The statute also provides that each bidder shall file with his bid an affidavit of noncollusion.

Again, it is provided that "such board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder." §3519 Burns 1905. See §§95, 107, Acts 1905, *supra*.

It will be presumed that public officers will do their duty, and in a case of this character it will be presumed that the board would not let the contract except to the lowest and best bidder, and in the event the bid was satisfactory.

The statute (§107, *supra*) further provides that upon confirmation of the resolution, or upon its modification, "it shall be final and conclusive upon all persons, unless within ten days thereafter, a majority of the resident freeholders * * * remonstrate against such improvement." In this case there was no remonstrance. The action of the board being final, the query suggests itself: Has not appellant slept on his rights, there being no fraud or collusion charged? I shall not pause to discuss this feature of the case, but merely say that it appeals to me with some force.

As above stated, the authorities upon the question for decision are not in accord.

Of the cases supportive of appellees' contention, the best-considered and reasoned one, in my judgment, is that of *Hobart v. City of Detroit* (1868), 17 Mich. *246, 97 Am. Dec. 185. That case, like this, was a street-paving case, and involved the right of the city to cause to be constructed a patented block pavement. Chief Justice Cooley wrote the opinion, and his reasoning is so clear and his statements so forceful that I desire to refer to it fully, and quote largely from it. The charter of the city of Detroit prohibited the council from entering into any contract for any public work, except to and with the lowest responsible bidder, and only after "advertised proposals and specifications therefor." A certain firm owned the patent and exclusive right to lay the Nicolson pavement. Such firm alone bid for the contract, and the contract was awarded to it. Appellant sued to enjoin the collection of the assessment against his property. In the opinion Cooley, C. J., said: "The doctrine of the complainant leads to this conclusion: That wherever, from the nature of the case, there can be no competition, the city can make no contract, however important or necessary for the interest of the city; since contracts, except by public letting, are forbidden by the express terms of the statute, and those by public letting are forbidden by an implication which is equally imperative. And if applied to this case, however much this mode of paving may exceed all others in utility, it can not be adopted in the city of Detroit, or in any other city with the like provision in its charter, even although the proprietors of the patent might be willing to lay it on terms more advantageous to the city than those on which pavements of less value could be procured. To support this conclusion, we must import into the statute a condition which we must suppose to pervade its spirit, but which is not expressed by its words. The power which the charter gives to the common council to cause the streets to be paved is conferred by another section in very ample terms—the sole condition

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imposed upon it being the public letting of the contract to the lowest bidder. The courts, I think, should be very cautious about importing new terms into a statute in order to make it express a meaning which its words do not convey, and they ought, at least, to first make sure that they are not changing the legislative intent, and giving the statute an operation that the legislature never designed, and, perhaps, would never have assented to. * * * But it is not, I apprehend, strictly correct to say that because the patented invention which must be made use of is owned by one person exclusively, therefore, no one else can be a bidder. Every one has a right to bid, and to take upon himself the risk of being able to procure the right to make use of the invention. Certainly the showing that Smith, Cook & Company owned the right to put down the Nicolson pavement in the city of Detroit does not go far enough to show that they alone could bid on a contract for that purpose. If that firm held the privilege of putting down the pavement for sale at a regular price per square foot or yard, the opportunity to bid for a public contract would be as much open to public competition as for any other work requiring skilled labor. For ought we know, this was the case; and we may well take notice of the fact that it is frequently by thus selling the 'royalty' that the owners of new inventions expect to obtain their reward. The royalty acquires a sort of market value which becomes well understood; and all persons have the benefit of this market value just as much as they would if the ownership and right to control were of such a character that monopoly would be impossible. True, the owner may at any time withdraw the royalty from sale in order to drive hard bargains; but, if he does, the public still retain a security in the power to refuse to contract with him. The theory of the complaint is that more than one bid in this case was impossible. But suppose, in point of fact, Smith, Cook & Company had not bid at all, but several other persons, having first ascertained

at what price they could obtain the royalty, had entered into a sharp competition for this contract, would it not have been demonstrated that not only was more than one bid possible, but that the very benefits the charter designed to secure by the public letting had been obtained? And if this is so, how can it be said that the fact that a monopoly of the patent exists necessarily defeats all contracts to which the patent is essential?"

In the more recent case of *Holmes v. Common Council* (1899), 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. 587, the supreme court of Michigan had before it the same question in principle. I quote from the opinion as follows: "Complainants' proposition seems to be that, under the charter, no paving contract shall be let which involves the use of any material which, by reason of its exclusive production, is not subject to competition, or perhaps, more accurately, complainants' claim is that such contract can not be made for the use of such material except when it had been subjected to a competition with some other material. This would result in some serious consequences. If such is the rule, the city may be denied the right to have the pavement that it wants, because some one is willing to furnish something else, that may be thought equally good, for a less price. One or two blocks of a street may be paved with Nelsonville brick, but, when it is desired to extend the pavement, they can not take bids, and proceed to pave with the same, if some other brick can be obtained cheaper. It may be that the cheaper price is made by interested parties, at a loss, to injure a rival, or for some other ulterior purpose, or because of insolvency, or it may be untried brick, or it may happen that the competing brick is not likely to be thereafter obtainable for repairs. But this would make no difference; the city must be subjected to these dangers and inconveniences, because it can obtain a lower bid. Thus, a pavement would be likely to be of a variegated pattern. This doctrine, carried out to its logical

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consequences, would prevent a city from doing any public work after an intelligent and well-digested plan, and the harmony and beauty of public improvements would be impaired. Whenever any article that should be the subject of a monopoly should be found to enter into a building or other improvement, the contract would be void, and payment could be enjoined by any taxpayer, if complainants' claim rests on solid ground. In this age of improvement and competition, we should not hold that municipalities are denied the most modern methods and improvements, unless it is clear that they have been prohibited. Many valuable innovations involve patents; others are introduced through agencies, as in this case, and they are, therefore, practically controlled by one person or firm. * * * The gist of complainants' claim is that the city can not specify the brick or other material made and controlled by one manufacturer, but must open the proposed improvement to competitors, and submit to the consequences of competition. * * * A more sensible view to take would seem to be that those charged with the making of an improvement should determine definitely what is wanted, and then advertise for bids, and let the contract to the lowest responsible bidder, leaving him to procure the material required as best he may. * * * Counsel seek to draw the line at patented articles; but we see no distinction between brick made by the Nelsonville company under patents, and brick made by the same company, but not under patents. * * * This rule applied to patented articles should extend to any desirable article, although, from the course of business, its manufacturers may have the exclusive sale of it."

In *Swift v. City of St. Louis* (1904), 180 Mo. 80, 79 S. W. 172, the right to contract for paving a street with "Warren's Puritan Brand" of cement (being same here involved) was under consideration, and it was held that when at the

time a street was proposed to be paved with bituminous macadam there was only one manufacturer who had succeeded in making a uniform coal-tar cement, which was available and necessary to be used to bind the macadam, an ordinance specifying that the cement to be used should be that made by such manufacturer was not void on the ground that it thereby prevented competition and denied taxpayers the right to have the work done by the lowest bidder, as provided by the city charter. The opinion is well considered, instructive and convincing.

In *Barber Asphalt Pav. Co. v. Hunt* (1889), 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. 530, it was held that the city of St. Louis was not prohibited from letting a contract to pave a street with material covered by letters patent. In that case it was further held that to rule otherwise would be to deprive the city of the right to enjoy the benefits of modern invention.

The same question was again before the court in the case of *Verdin v. City of St. Louis* (1895), 131 Mo. 26, 33 S. W. 480, 36 S. W. 52, and the holding in the case of *Barber Asphalt Pav. Co. v. Hunt*, *supra*, was reaffirmed, and the doctrine as to a patented material was even extended to a material whereof the owner had a monopoly by reason of his exclusive ownership of such material.

A case possibly most directly in point is that of *Hastings v. Columbus* (1885), 42 Ohio St. 585. There the city let a contract to pave a street with a patented pavement. It was urged that the contractors owned the patent, and for that reason there could be no competition in bidding, and hence no valid assessment could be made against abutting lots. Before the contract was let, however, the city had acquired the right to secure, at a reasonable cost, the right of such patent, with respect to the improvement, for any successful bidder for the work. It was held that under such facts bidders were placed by the city, in this respect,

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substantially upon equal terms, and that the objections urged to the contract were not tenable. The only difference between that case and this is that there the city secured the right to all bidders to use the patent at a reasonable cost, while here the patentees enter into an agreement with the city to furnish, at a fixed price, the patented product to any successful bidder who is equipped or may become equipped to use it, and to furnish an expert free of charge to instruct the successful bidder how to use it.

Field v. Barber Asphalt Pav. Co. (1902), 117 Fed. 925, is in point. There the city of Westport, Missouri, let a contract to pave a street, and the contract called for "Lake Trinidad Asphalt." In the course of the opinion Mr. Justice McPherson said: "There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing the commerce clause of the Constitution was violated, and that the federal anti-trust statutes were likewise violated. And this argument is emphasized by complainant's counsel, because, as he contends, the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so. But, if it does have the monopoly, I do not believe the point is well taken. Any individual certainly has the right, in the erection of an improvement, to get that which he believes the best, and that which he prefers, regardless of the reason; and he should not defeat a recovery by showing that in fact something else was as good or better, or that the vender had a monopoly. And why should not the same holding be made as to a city? Can it be so that because the city concludes, although wrongly, that Trinidad is the best asphalt, that its contract must be canceled on a showing that the Trinidad is not the best, and that it is the subject of a monopoly? Why limit the evidence to other asphalts? Why not receive

evidence as to brick or other paving? I think this matter was in the province of the city to determine, and that the courts have no right to review it.”

In *Newark v. Bonnell* (1894), 57 N. J. L. 424, 31 Atl. 408, 51 Am. St. 609, it was held that where the proper municipal board advertises in good faith for proposals for paving streets, and specifies the employment of the material deemed to be for the best interests of the municipality, the city is not debarred by any rule of law from contracting for what it wants, merely because the desired material is the subject of private ownership or the product of exclusive manufacture.

To the same effect is the case of *Ryan v. Patterson* (1901), 66 N. J. L. 533, 49 Atl. 587. The pavement there ordered was to be of the standard of Trinidad lake asphalt. The court said: “If it appears that the action of the city authorities was taken in an honest belief that to award the contract as they did was for the best interests of the public, it will not be disturbed, even though the court, on a review of the same facts, may think that another conclusion would have been justified. The law places the obligation upon the municipal authorities, and not upon the court, and where there are facts which show their action to be consistent with an honest judgment the court should not interfere. *Van Reipen v. Jersey City* [1895], 58 N. J. L. 262, 268, 33 Atl. 740; *Findley v. City of Pittsburg* [1876], 82 Pa. St. 351; *Ferguson v. Passaic* [1897], 60 N. J. L. 404, 38 Atl. 676. In *Oakley v. Atlantic City* [1899], 63 N. J. L. 127, 44 Atl. 651, Mr. Justice Lippincott stated the rule in this wise: ‘In the absence of fraud or palpable abuse of discretion on the part of the municipal authorities in the exercise of the power granted by the legislature, the only question for judicial cognizance is whether there has been any violation of legal principles or neglect of prescribed formalities in entering into the engagement which is the subject of the controversy.’”

The supreme court of Tennessee, in the case of *Beazley v. Kennedy* (1899), (Tenn.), 52 S. W. 791, held that the board of public works and affairs of a municipality, incorporated under the act of 1883, providing that it shall have exclusive control of the fire department and exclusive power to make all expenditures therefor, but that when a contract involves more than \$50 it shall be let to the lowest responsible bidder, is the judge of the quality of desired supplies, and hence when a fire hose was needed, such board may in good faith limit the bidding to two designated brands.

The following New York cases, it seems to me, are in substantial harmony with those I have cited: *Baird v. Mayor, etc.* (1884), 96 N. Y. 567, 582, 583; *In re Petition of Dugro* (1872), 50 N. Y. 513; *Harlem Gas Light Co. v. Mayor, etc.* (1865), 33 N. Y. 309; *People, ex rel., v. Van Nort* (1872), 64 Barb. 205; *People, ex rel., v. Flagg* (1858), 17 N. Y. 584.

In *Dolan v. Mayor, etc.* (1868), 4 Abb. Prac. (N. S.) 397, it was held in the special term of the supreme court that a patented pavement could not be used. On appeal to the general term, reported in the New York Daily Transcript of February 8, 1869, the decision of the special term was reversed, the court holding upon the authority of the case of *In re Petition of Dugro, supra*, that a patented pavement could be used. The cause was appealed to the court of appeals, and was affirmed *per curiam*, with an opinion. *Dolan v. Mayor, etc.* (1876), 67 N. Y. 609.

The decision of the general term reversing the decision of the special term has some pertinent observations, which I desire here to quote: "In the former of these cases a resolution and ordinance had been passed to pave Thirty-third street with Nicolson pavement, and an injunction was granted to prevent such pavement. In the second case a similar ordinance had been passed to pave Seventh avenue with Stafford pavement, and an injunction was granted to prevent the same. The injunction on argument before the

special term in the first case was dissolved, and in the second case was continued. Both cases are brought upon appeal and present the same question for our consideration. The grounds upon which the injunctions were granted were that these pavements were each patented and could not be the subject of competition among contractors and the corporation could not contract for its use or cause said pavement to be laid without a violation of the city charter, which provided, among other things, that such contract shall be made on bids made on public notice and given to the lowest bidder, and the act of April 17, 1861, directs that all contracts shall be awarded to the lowest bidder. The right to use these pavements being secured by patent, the Nicolson pavement to a company in the one case, and to individuals in the other case, it is contended that no competition can take place in regard to doing this work, and that there can be no offer for bids that can be of any avail; therefore, that by this provision of the charter the corporation can not contract for these pavements and that the patentees are virtually prohibited from using the same. The real question, therefore, is whether, when a municipal corporation is required by its charter to accept bids for work or materials required for the use of the corporation, patented articles or modes of doing work are prohibited by that provision because such articles or mode of work can not be the subject of competition? There can be but little difficulty in adopting the conclusion that no such proposition was before the legislature when they passed the statute.

* * * If they had intended to prohibit the use of a patented article or work for this reason, they would have used language applicable to such purpose by express prohibition. * * *

This narrows the inquiry down to the question of whether a statute requiring work to be done and materials to be furnished by contract for a municipal corporation prohibits the use of everything which is patented, or belongs exclusively to one or more individuals.

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* * * To say that in such cases the city should not use the patented articles, would be to deprive them of all improvements in matters necessary to the municipal government and leave them to travel in the same paths in which their predecessors trod, without benefit from any new discoveries of science, or any advance in modes of work applicable to public use. The statute in question does not, in my judgment, require any such construction. * * * As it is apparent the law did not in terms prohibit the use of patented articles of work, we are not warranted in the conclusion that any intent existed to deprive the city, in cases where the interest of the city required the use of such articles or work, of using them in the only way in which it could be done. * * * The object of the provision in the charter was not to exclude any article or work from public use. * * * There is nothing in the law which contains any such prohibition, even if a literal construction of the act should be sufficiently comprehensive to warrant such exclusion. My conclusion is that this injunction can not be sustained."

The question of the right of a city to improve its streets with a patented pavement is reviewed by an able author (Mr. A. R. Watson), in 20 Am. and Eng. Ency. Law (2d ed.), 1166. I quote as follows therefrom: "Two views have been taken of the effect of a provision requiring advertisements and bids for patented articles or articles or materials controlled by a monopoly. One is that municipal corporations are thereby precluded from requiring articles or materials with reference to which there can not be free competition in the bidding. The other and far more preferable view is that where the best interests of the city will be subserved by the use of a patented article or an article controlled by a monopoly, procurable from only one source, the provision in question has no application whatever, the case being without its spirit and intention. Another doctrine seems to require advertisements for bids,

but permits a contract involving the use of a patented or monopolized article if deemed best for the city.”

The New York street-improvement case, to which I have referred, directly involving the right to use a patented pavement, is in harmony with the above quotation. *McQuillin*, Mun. Ordinances, §554.

It is stated that the tendency of the courts favors the adoption of the Michigan rather than the Wisconsin rule. The opinion of Justice Brewer in *Yarnold v. City of Lawrence* (1875), 15 Kan. 126, expressly approves the Michigan case (*Hobart v. City of Detroit* [1868], 17 Mich. *246, 97 Am. Dec. 185) and disapproves the Wisconsin case. (*Dean v. Charlton* [1869], 23 Wis. 590, 99 Am. Dec. 205). I find, therefore, that there are at least eight jurisdictions in which the old Wisconsin rule is disapproved and the Michigan rule is followed, in which jurisdictions it is now settled that a patented pavement may be used, notwithstanding a statutory provision which requires competitive bidding. It will be thus observed that the Michigan rule has been adopted by a larger number of the courts of last resort in the United States than has the Wisconsin rule, and the cases which support the Michigan rule are far more numerous than the other. The supreme court of Michigan still follows the case of *Hobart v. City of Detroit*, *supra*. See *Attorney-General v. Detroit* (1872), 26 Mich. 263; *Holmes v. Common Council* (1899), 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. 587.

The latter case is a well-reasoned one, and is on all fours with the case in hand. The opinion in that case closes with the following: “We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer.” It will be observed by a reference to the statute that it does not require competitive bidding at all as to

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the material to be used in the improvement of the street, for it simply refers to works and not to supplies or material.

The improvement of a street must be considered as a whole, for it embraces everything that is necessary to complete the work. In competitive bidding, therefore, for such work it is not necessary for the bidder to submit his bid in piecemeal, to wit: so much for grading, so much for excavations, so much for drainage, if drainage is required, so much for materials, whether such materials be covered by patent or not, and so much for work and labor, but his bid may be submitted as a whole for the completed job.

The case of *Dean v. Charlton* (1869), 23 Wis. 590, 99 Am. Dec. 205, so strongly relied upon by appellant, is shorn of much of its force by the later decision of that court in the case of *Kilvington v. City of Superior* (1892), 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45.

There the city of Superior contracted for the erection of a crematory to consume garbage, etc., and it was held that the fact that the mode of building the crematory was patented would not make the contract for its construction void, when the contract for performing the work and furnishing the materials is let to the lowest bidder, with the understanding that the patentee would allow the use of his patent and superintend its construction in consideration of a certain specified sum, to be paid to him by whoever secured the contract. That case is, in principle, exactly like this, and hence supportive of appellees' contention. I quote from the opinion in that case the following: "In view of the legislation which followed *Dean v. Charlton* [(1869), 23 Wis. 590, 99 Am. Dec. 205], and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart v. City of Detroit* [1868], 17

Mich. *246, 97 Am. Dec. 185, and *Motz v. Detroit* [1869], 18 Mich. *495, *515, decided at about the same time, a contrary conclusion was reached; and in *Nicolson Pav. Co. v. Painter* [1868], 35 Cal. 699, and *Burgess v. City of Jefferson* [1869], 21 La. Ann. 143, the rule of the majority of the court in *Dean v. Charleton, supra*, was sustained. Since then, in *In re Petition of Dugro* [1872], 50 N. Y. 513, the question has been decided in conformity with *Hobart v. City of Detroit, supra*, and other like cases; and in *Yarnold v. City of Lawrence* [1875], 15 Kan. 126, Brewer, J., notices the diversity of judicial opinion on the question, and is inclined to favor the views of the courts of Michigan and New York. *Baird v. Mayor, etc.* [1884], 96 N. Y. 567. In the present case there was a definite, well-settled price for the patent and specifications, at which it was held and offered to the city and all contractors, which would limit the recovery of the patentee, so that in fact there was free competition for the work and materials and all else except the patent. The city had the benefit of all the competition of which the nature of the work admitted; and in such cases, where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when, for performing the work and furnishing materials, the advantage of competition is secured."

The California, Louisiana and early Wisconsin cases, as they appear to me, are based upon a consideration or ground that does not exist here. And further than this, the supreme court of California has, it seems to me, receded from its earlier holding in the more recent case of *Perine, etc., Pav. Co. v. Quackenbush* (1894), 104 Cal. 684, 38 Pac. 533. I make the following quotation from that case, to show the force of the opinion, to the end that it may be

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apparent that the judicial tribunal of last resort of California is now in harmony with the views herein expressed: "Appellant relies upon *Nicolson Pav. Co. v. Painter* [1868], 35 Cal. 699. That case does not sustain appellant, though some expressions used in the opinion give color to his claim. By an act approved April 22, 1866 (St. 1865-66, p. 720), it was provided that whenever a majority of the owners in frontage should petition the board of supervisors of the city and county of San Francisco for the construction of the Nicolson pavement, they should order it to be done. In that case the owners did not so petition, but nevertheless the board ordered the Nicolson pavement to be used, and it was held that their proceedings were void. Sanderson, J., said, in the course of the opinion, in substance, that where there can be but one bidder, and where the owners are prohibited by heavy penalties from doing the work, to advertise for sealed proposals, and open, examine, and declare them, 'would be to play as broad a farce as was ever enacted behind the footlights.' But elsewhere in the same opinion the same learned justice said: 'It is true that the third section (St. 1862, p. 391), which confers the power to pave, does not restrict the board to any kind of pavement, and if the question turned exclusively upon that section, the board would have the power to contract at its election for any kind in use.' As no act, such as the Nicolson pavement act, restricts the powers of the board to order the bituminous rock pavement, we may adopt the language of Sanderson, J., last-above quoted, as applicable to this case, and as correctly declaring the law. Besides, in this case the specifications did not confine bidders to one patented process, nor exclude processes not patented; nor were the owners excluded from using the patented processes, but had the liberty to use them upon payment of a royalty of \$1 per ton of the rock treated. Appellant's contention would effectually exclude all methods of paving which were patented, even though such method, because of

its superiority, or even because of its cheapness, would be specially advantageous to the owners of lots liable for the expense of paving, as well as the municipality charged with its maintenance."

The Kentucky case (*Fineran v. Central, etc., Pav. Co.* [1903], 116 Ky. 495, 76 S. W. 415), relied upon by appellant, is not of controlling influence, because the facts upon which the decision is based are so vitally different from those at bar. There the ordinance required the council to accept the bid of the lowest and best bidder. Here the board of public works has the right to reject any and all bids. The facts in that case also show that no one but the appellee, who owned and controlled the patent, could obtain the right to lay the pavement, or make a *bona fide* bid for the construction of the street with the material in question, and the council knew such to be the fact.

Here it is admitted that any one who desired to bid for the work under contemplation had a right to secure from the patentee, at a fixed and known price, the necessary materials, etc., with which to construct the pavement.

I do not deem it important to review the other authorities which have been cited. After a careful consideration of the question involved, and the authorities pro and con, I have reached the conclusion that the great weight of authority and the best-considered opinions abundantly support the contention of appellees. A patent right or a commercial product manufactured under a patent right does not constitute an unlawful monopoly. Such right is given by the laws of the United States as reward for inventive genius and for the benefit of the public. Personally, I do not know anything about the merits or demerits of the particular kind of pavement which the board of public works of the city of Indianapolis has ordered constructed in this case, but I do know that the public, as well as the individual, is entitled to the best that can be procured within reasonable restrictions, and should it transpire that this par-

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ticular kind of pavement is the best in the market, and that it can be constructed for or within a reasonable range of other modern pavements, then the courts ought not to strain the law to prevent its use, especially when a majority of the resident freeholders have petitioned for it.

The facts pleaded in the answer make a much stronger case in favor of the rule first declared in the case of *Hobart v. City of Detroit* (1868), 17 Mich. *246, 97 Am. Dec. 185, than can be found in any of the decided cases. The answer proceeds upon the accepted theory that in the improvement of a street the work must be open to competition. In the agreement filed with the board by the owner of the patented process, with which it is proposed to improve the street, that feature is made prominent, and it is said that "inasmuch as in the construction of such pavement the use of certain compounds are necessary, and in the letting of contracts for all such street improvements competitive bidding is necessary, and for the purpose of permitting such competitive bidding," etc., the patentee agrees that any bidder may have the right to use and purchase the patented processes and compounds upon certain terms.

By the agreement the patentee binds himself to furnish to any bidder to whom the contract may be awarded, "who is equipped or shall equip himself with the necessary appliances purchasable in the open market for preparing and laying such pavement," all the necessary compounds, etc., for the sum of ninety cents per square yard for such pavement. It is further stipulated to allow the contractor to use the patented process and to furnish an expert who will advise in laying the pavement without extra charge. That part of the agreement which appears in quotation above seems to be the stumbling block which my associates have not been able to avoid. Without that clause in the agreement, it is held that the patentee could "absolutely control the bidding and that with such control there could be no competitive bidding except only in name." Referring to

that provision, it is further said that "the patentee has the power to determine indirectly but effectively to whom the contract shall be awarded, by reserving to himself the right to determine arbitrarily who is equipped with the necessary appliances for laying the pavement. * * * When the patentee, although granting the right to use the patent, reserves a right by which he may determine arbitrarily who shall have the contract, he has not, so far as competition among bidders is concerned, conceded anything." Here is where, I think, the prevailing opinion is radically wrong, in that it erroneously construes that particular provision of the contract.

It is not a reasonable construction, nor one in accord with all the other conditions of the contract, to hold that under that particular provision the patentee reserved to himself the arbitrary right to say or determine whether or not the successful bidder "is equipped or shall equip himself with the necessary appliances," etc. The necessary appliances, etc., to which reference is made, are no part of the patent, or covered by a patent, but are purchasable in the "open market" by any one. The patentee has no voice in the matter, unless it might be merely to indicate what tools, appliances, etc., were necessary properly to lay the pavement. Or we might reasonably presume that any one who desired to bid for the work would first acquaint himself with what was necessary successfully to perform his contract.

But as to what are "necessary appliances," etc., for laying the pavement, is not left to the arbitrary determination of the patentee, for the patentee agrees to furnish the compounds, etc., to any contractor to whom the city may let the contract, who has, or who will get, the necessary appliances. These conditions are open to all.

It is for the board of public works to determine, in its contract with the successful bidder, whether he has the necessary appliances with which to do the work. His con-

tract and bond would protect the interests of the city, the property owners and the patentee.

Suppose, under the facts in this case, that the contract had been let, and the contractor was ready to proceed with the work; but the patentee refused to let him have the "necessary compounds" on the ground that he was not equipped with the "necessary appliances" to do the work. But suppose, as a matter of fact, he was so equipped, and could do the work successfully—could it be reasonably contended that the patentee, upon such showing, would arbitrarily be allowed to say that he would not carry out his agreement? I think not. The very purpose of the agreement, specifically declared, was to pave the way to open and free competition, and yet in the very face of this fact it is construed by my associates as stifling competition. Such construction is, in my judgment, not warranted, under the provisions of the agreement.

For these reasons, and upon the authorities I have cited, I am constrained to disagree with my associates. The demurrer to the answer was properly overruled by the trial court, and the judgment should be affirmed.

DE TARR v. THE STATE.

[No. 5,863. Filed February 13, 1906.]

1. **NEW TRIAL.**—*Criminal Law.—Evidence.—Statutes.*—Under subdivision nine, §1911 Burns 1901, §1842 R. S. 1881, insufficiency of the evidence is not a ground for a new trial in a criminal case. p. 324.
2. **SAME.**—*Criminal Law.—Evidence.—Statutes.*—That the decision is contrary to law, is a ground for a new trial in a criminal case under subdivision nine, §1911 Burns 1901, §1842 R. S. 1881, and a failure of the proof to sustain the charge renders the decision "contrary to law." p. 324.
3. **STATUTES.**—*Construction.—Intention.—Criminal Law.*—Courts, in the construction of criminal statutes, will look to the evil that was intended to be remedied. p. 327.

4. **CRIMINAL LAW.—Intoxicating Liquors.—Sales.—Druggists.**—Where a druggist, who was also a practicing physician, filled a practicing physician's written prescription, in good faith, for a half-pint of whiskey for such physician's patient, to be taken a teaspoonful every hour, and such whiskey was so taken, a conviction for an unlawful sale of whiskey under §7283j Burns 1901, Acts 1895, p. 248, §9½, can not be upheld, though such practicing physician had no license at the time to practice medicine. p. 327.

From Pike Circuit Court; *E. A. Ely*, Judge.

Prosecution by the State of Indiana against David De Tarr. From a judgment of conviction, defendant appeals. *Reversed.*

J. W. Wilson and *D. D. Coon*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild* and *W. C. Geake*, for the State.

WILEY, J.—Appellant is a druggist, and was prosecuted and convicted for selling intoxicating liquor in less quantity than a quart without the written prescription of a "reputable practicing physician."

Overruling his motion for a new trial is the only error assigned.

The reasons for a new trial are: (1) That the decision is not sustained by sufficient evidence; (2) that the decision is contrary to law. Under the statute (subd.

1. 9, §1911 Burns 1901, §1842 R. S. 1881), insufficiency of the evidence is not a ground for a new trial in a criminal case. *Huffman v. State* (1899), 21 Ind. App. 449, 69 Am. St. 368; *Baum v. State* (1901), 157 Ind. 282, 55 L. R. A. 250.

If, however, the evidence fails to sustain the charge in the indictment, a verdict or decision finding the accused guilty will be regarded as contrary to law. *Stout*

2. v. *State* (1881), 78 Ind. 492; *Deal v. State* (1895), 140 Ind. 354. By this rule, under the second reason for a new trial, if it appears from the record that the evi-

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dence fails to sustain the charge against appellant, a reversal should be ordered.

Appellant was indicted under §7283j Burns 1901, Acts 1895, p. 248, §9½, which provides: "It shall be unlawful for any spirituous, vinous or malt liquors to be sold or given away in any drug store in any quantity less than a quart at a time, except upon the written prescription of a reputable practicing physician."

The material facts upon which appellant was convicted may be briefly narrated as follows: During the month of July, 1904, and for a long time prior thereto, and ever since, appellant owned and operated a drug store in the town of Winslow, Pike county, Indiana. A part of the stock in the store was whiskey which was sold for medicinal purposes on prescription. Appellant was during the month of July, 1904, for a long time prior thereto, and ever since has been, a reputable, practicing physician. During the month of July, 1904, and for a short time prior thereto, Dr. H. T. Baily was and ever since has been a practicing physician in Pike county, Indiana. In the months of June, July and August, 1904, Frank Erwin and his wife resided in the town of Winslow, and part of June and during the month of July of that year Mrs. Erwin was sick, and during a good part of her sickness was confined to her house and to her bed, was nursed by her sister, and attended by Dr. H. T. Baily as her family physician. On the 2d day of July, 1904, during her sickness, he prescribed for her one-half pint of whiskey, to be taken in doses of a teaspoonful every two hours, and wrote out the prescription as follows: "R. For Frank Erwin. One-half pint spirits fermenti. Sig: Teaspoonful every two hours. [Signed] H. T. Baily, July 2, 1904." He handed it to Frank Erwin, the party therein named, and told him to get it filled. Erwin took it, went across the street to the drug store of appellant, handed the prescription to appellant, who took it, filled it, put label on bottle with directions

thereon, and handed it to Erwin, who paid appellant twenty-five cents for it. Erwin took it home, and it was given to the patient, for whom it was intended, as prescribed, in teaspoonful doses every two hours. At the time Dr. Baily treated Mrs. Erwin he had no license or permit to practice medicine in the State of Indiana, but was, as he testified, practicing under appellant. He used the office and office outfit of appellant, used his horse and buggy, and consulted with appellant about cases he was treating, among which was that of Mrs. Erwin. He paid nothing for the use of the office, horse and buggy, and consultations. Appellant received no part of the fees and earnings of Dr. Baily, but when medicines and drugs were bought by Dr. Baily he paid for them himself. Dr. Baily called on people and treated them, and was generally known in the community as a practicing physician. A short time after he gave the prescription to Erwin he made application to the state board of medical examiners for a license to practice in this State, which was granted. At the time Dr. Baily wrote the prescription for Erwin he was a graduate and held a diploma of a reputable medical college in Louisville, Kentucky, which was recognized as such by the state board of medical examiners of the State of Indiana. Appellant testified that he filled the prescription and let Erwin have the whiskey in good faith.

Under these facts appellant ought to be relieved from the judgment of conviction, unless the statute is so iron-bound and the law so implacable that the letter of the former will not yield to its spirit, and the rigor of the latter will not bend to the demands of justice and good conscience. It is apparent from the facts that Dr. Baily gave the prescription in good faith, for the benefit of his patient; that appellant filled it in good faith, in the honest belief that it was his duty to do so. The whiskey was used by the patient for medicinal purposes, and was administered to her as

directed by the prescription. The facts are such as make manifest that the parties to the transaction acted in good faith.

In the construction of a criminal statute it is proper to look to the evil that was intended to be remedied. The

statute under which this prosecution is waged was

3. directed against the pernicious habit which had grown up in this State of the indiscriminate sale by druggists of intoxicating liquors, to be used as beverages, under the false guise that such sales were for medicinal purposes. As against that habit we unalterably declare in favor of a strict enforcement of the statute.

It is recognized in the medical profession that the use of whiskey for medicinal purposes is in many instances salutary and useful. It is often prescribed and recom-

4. mended by physicians. When there is a substantial compliance with that statute, and parties act in good faith, we would be derelict in judicial discretion if we did not apply the spirit of the statute instead of the strict letter thereof, and thus protect those who have done no legal wrong.

As was said by this court in *Kyle v. State* (1897), 18 Ind. App. 136: "It is evident that the legislature intended by the section of the statute above quoted to inhibit absolutely the sale or gift in drug stores of intoxicating liquors to be drunk as a beverage, and that all sales or gifts in drug stores should be made only for medicinal purposes, and upon a physician's written prescription."

In this case the sale was made upon the written prescription of a physician, and that prescription was in proper form.

In the case of *Ball v. State* (1875), 50 Ind. 595, the Supreme Court said: "Any person who sells intoxicating liquor on a proper occasion, in good faith and with due caution, for medical purposes only, is as much shielded by the spirit of the act as if he were exempted from the penalty by express words."

In *Nixon v. State* (1881), 76 Ind. 524, appellant, who was a druggist, was indicted and convicted for selling intoxicating liquor without a license. It was established by the evidence that the person to whom he sold it purchased it in anticipation of his wife's confinement, and solely for medicinal purposes. Before making the sale appellant inquired of the purchaser whether it was to be used for medicinal purposes, and upon being assured that it was, he let him have it. In reversing the judgment the court said: "It is true that the statute, under which the appellant was indicted, contains no exceptions authorizing the sales of intoxicating liquors, without license, for medicinal, chemical or sacramental purposes. But it has always been held by this court, in construing similar statutes, that the courts will except, from the prohibitory or penal provisions of the statute, all *bona fide* sales of such liquors for such purposes." To the same effect are the following cases: *Hooper v. State* (1877), 56 Ind. 153; *Ball v. State*, *supra*; *Jakes v. State* (1873), 42 Ind. 473; *Thomasson v. State* (1860), 15 Ind. 449; *Donnell v. State* (1851), 2 Ind. *658.

This court, in *Parker v. State* (1903), 31 Ind. App. 650, held that where a druggist, without a license to sell intoxicating liquors and without a prescription from a physician, sold a compound consisting of whiskey and gum guaiacum, to be used, and which was used by the purchaser, for medicinal purposes, such sale was not in violation of the statute making unlawful the sale of intoxicating liquors without a license. In harmony with the settled law in this State the court said, in the case last cited: "Criminal statutes are not always strictly construed."

The principal argument by the learned Attorney-General in support of the judgment below is based upon the asserted proposition that the sale made by appellant was in violation of the statute cited, because the evidence shows that the prescription upon which it was made was not the prescription of "a reputable practicing physician." This

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proposition is based upon the fact that at the time Dr. Baily gave the prescription he did not have a permit or license from the state board of medical examiners to practice medicine in this State.

In view of the facts in this case, which are all favorable to appellant, and lead us to the conclusion that he was wrongfully convicted, we deem it wholly unnecessary for us to consider or decide this question. As the evidence fails to sustain the charge in the indictment, the decision, upon the authority of *Stout v. State* (1881), 78 Ind. 492, and *Deal v. State* (1895), 140 Ind. 354, is contrary to law.

The judgment is reversed, and the trial court directed to sustain appellant's motion for a new trial.

Robinson, Myers and Comstock, JJ., concur. Roby, C. J., and Black, P. J., absent.

CLINE v. HAYS.

[No. 5,424. Filed November 28, 1905. Rehearing denied February 14, 1906.]

1. **QUIETING TITLE.**—*Ownership in Fee Simple.—Failure of Proof.*—Where plaintiff, in a suit to quiet title, alleged a fee-simple title and his proof showed that he held such title except a small undivided interest belonging to an heir of a deceased grantee, there is a failure of proof. p. 331.
2. **SAME.**—*Adverse Possession.*—Where defendant has held possession of lands for twenty years claiming such lands to be his own, such possession is adverse and he is the owner of such lands. p. 331.

From Scott Circuit Court; Willard New, Judge.

Suit by Noble J. Hays against Jonathan C. Cline. From a decree for plaintiff, defendant appeals. *Reversed.*

James F. Ervin and *O. H. Montgomery*, for appellant.
Storen & Hays, for appellee.

COMSTOCK, J.—The appellant and appellee are now, and have been for more than five years, adjoining landowners

in Scott county, Indiana. They and their grantors, since 1874, have maintained a partition fence on the line dividing the lands occupied by them. In the fall of 1903 a controversy arose between them on account of the condition of the fence. Appellee gave notice that he would apply to the trustee to have appellant's allotment of the fence repaired, and appellant gave notice that he would call upon the county surveyor to run the line and establish the corners. The surveyor made measurements and calculations, and finally concluded that there was a strip of twenty-two links width lying between their lands and upon which the fence stood, leaving a strip on either side of the fence and giving to each more land than his deed called for. Appellee bought this alleged surplus from some of the heirs of the original grantor, and brought this suit for possession of and to quiet title to this alleged surplus strip of land. The issues of fact were joined upon a complaint in five paragraphs, and an answer of general denial to the first two of said paragraphs and a denial and disclaimer in part to the remaining three paragraphs of the complaint. The court made a special finding of facts and rendered judgment thereon in favor of appellee, that the plaintiff, Noble J. Hays, is the owner in fee simple of the land in controversy. The reasons for a new trial are: (1) That the decision of the court is not sustained by the evidence; (2) the decision of the court is contrary to law.

Appellant, in the progress of the trial, took many exceptions to the rulings of the court, and assigned numerous specifications of error; but the only specification discussed is the overruling of his motion for a new trial.

Several of the special findings are without sufficient evidence to support them. It is found that on April 28, 1874, Thaddeus Terrell was the owner in fee simple of the real estate in controversy. The evidence shows that by mesne conveyances appellant and appellee obtained possession of the same. There is no evidence that the immediate

grantees or the parties to this suit entered into possession of the land in question, in recognition of or subservient to the title of Thaddeus Terrell, deceased. On the contrary, the evidence shows that the successive owners believed the fence to be the line, and maintained it jointly as such, and erected cribs, pens, and outbuildings, and cultivated the land up to such line, and this condition extended over a period of more than twenty years. Findings numbered twenty-two and twenty-three are as follows: "(22) That on December 18, 1903, Julia A. Terrell (widow of said Thaddeus Terrell), Newton J. Terrell and others, sole heirs at law of Thaddeus Terrell, deceased, duly conveyed to Tersa Hays the real estate mentioned and described in finding numbered eight, above, for a valuable consideration. (23) That on January 1, 1904, Tersa Hays and Henry T. Hays, her husband, duly conveyed to the plaintiff in this action, Noble J. Hays, the fee-simple title to the real estate described in finding numbered eight, above referred to [being the land in controversy], for a valuable consideration."

A deed from Julia Terrell and another, as a link in the chain of appellee's title, to Tersa Hays, for the land in dispute, was read in evidence by appellee. It recites:

1. "The grantees are the sole heirs of Thaddeus Terrell, except Nora Gray, minor heir of Caroline Gray, deceased." This recital would not be conclusive evidence as to third parties, but, if it be accepted as proof of the facts recited, still it appears upon its face that there was one interest which did not pass by it and the record does not disclose that appellee obtained title to the interest of said minor. We cite no authority in support of the proposition that the appellee must recover, if at all, by the strength of his own title. In addition, appellant held possession
2. up to the fence line more than twenty years, claiming title not in subservience to the title of another, either by a direct acknowledgment or an open denial of

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right on his part. This made his possession adverse. *Logsdon v. Dingg* (1904), 32 Ind. App. 158, and cases cited; *Pittsburgh, etc., R. Co. v. Stickley* (1900), 155 Ind. 313; *Burr v. Smith* (1899), 152 Ind. 469.

Judgment is reversed, with instructions to sustain appellant's motion for a new trial.

DOUGLAS ET AL. v. INDIANAPOLIS & NORTH- WESTERN TRACTION COMPANY.

[No. 5,487. Filed February 14, 1906.]

1. TRIAL.—*Motions.*—*Venire de novo.*—A motion for a *venire de novo*, as applied to a general verdict, questions only such defects as appear upon the face of the record. p. 335.
2. APPEAL AND ERROR.—*Order Book.*—*Bill of Exceptions.*—*Conflict.*—*Which controls.*—Where there is a conflict between the order book and the bill of exceptions, as to whether a motion was joint or several, the bill controls. p. 336.
3. TRIAL.—*Motions.*—*Venire de Novo.*—*Reasons.*—*Appeal and Error.*—A motion for a *venire de novo*, oral or written, must disclose the reasons therefor, and such reasons must be shown by the record. *Swift v. Harley*, 20 Ind. App. 614, limited. p. 336.
4. EMINENT DOMAIN.—*Interurban Railroads.*—*Awards.*—*Exceptions.*—*Effect of.*—*Burden of Proof.*—The filing of an exception to an award, in condemnation proceedings by an interurban railroad company, in effect sets aside such award and the cause must be tried *de novo*, the burden being upon the landowner to prove his damages. p. 337.
5. SAME.—*Awards.*—*Payment.*—*Effect of.*—The payment of an award in condemnation, by an interurban railroad company, gives the right of possession to the lands appropriated, but does not preclude an appeal by such company. p. 337.
6. JUDGMENT.—*Motion to Modify.*—*Parties.*—Where judgment, on an appeal from an award in an interurban railroad condemnation proceeding, is rendered against the landowners for the return of the excess of the award over the judgment on appeal, the lessee is not injured in overruling his motion to modify same, no part of such judgment being against him. p. 338.

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7. EMINENT DOMAIN.—*Awards.—Appeal.—Judgment for Excess.*—Where an interurban railroad company paid an award in condemnation, but on appeal the verdict was for a smaller sum, the trial court is authorized to render judgment in favor of such company for the excess so paid, such payment being involuntary in a legal sense. p. 338.
8. JUDGMENT.—*Personal.—Nonresidents.—Waiver.*—Where non-residents enter a full appearance and file pleas in bar in an interurban condemnation proceeding, personal judgments may be rendered against them, such appearance being a waiver of the right to question jurisdiction. p. 339.
9. COSTS.—*Basis of Right.*—Costs are given or withheld by legislative authority. p. 339.
10. SAME.—*Eminent Domain.—Appeals from Awards.—Civil Actions.*—Costs, in an appeal from an award in condemnation, are taxable as in other civil causes on appeal. p. 339.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Condemnation proceedings by the Indianapolis & Northwestern Traction Company against Thomas W. Douglas and others. From a judgment for defendants for less than their claim, they appeal. *Affirmed.*

W. R. Moore, for appellants.

Pierre Gray, for appellee.

MYERS, J.—In the court below, appellee, by filing an instrument of appropriation, sought to appropriate a strip of land belonging to appellants Thomas W. Douglas and his wife, Nettie B. Douglas, for a right of way as authorized by an act of the General Assembly approved March 11, 1901 (Acts 1901, p. 461, §§4, 5, §§5468d, 5468e Burns 1901), and as amended by an act approved February 26, 1903 (Acts 1903, p. 92, §§2, 3, §§5468d, 5468e Burns 1905). By this instrument it is made to appear that Douglas and Douglas were the owners of the real estate sought to be appropriated; that Sherman L. Culbertson was and is a tenant of said owners, and in possession of, and claiming some interest in, the real estate, the nature of which is unknown to appellee, and he is made a party in order that he may protect any interest he may have in or

to the real estate sought to be appropriated. LeSeure is made a party as mortgagee in order that he may protect his interest. Douglas, Douglas and Culbertson appeared and answered by a general denial. No answer by LeSeure. Upon such act of appropriation such proceedings were had that appraisers were appointed who assessed and awarded to Douglas, Douglas and Culbertson, appellants herein, the sum of \$2,550 as damages. On August 24, 1903, Douglas, Douglas and LeSeure acknowledged the receipt of the entire sum of \$2,550 so awarded by such appraisers, and on the same day Culbertson receipted to said clerk for his interest in said award. Within the time allowed therefor appellee in the court below duly filed its exceptions to said award for the reason that "(1) the award of damages is too large, and (2) the award of damages is excessive." Other reasons were assigned, which, on motion of appellants, were by the court stricken out. A general denial to the exceptions formed the issue. Upon a trial by jury the damages of Thomas W. and Nettie B. Douglas were assessed at \$2,000.

The transcript before us shows that the verdict of the jury was returned on March 15, 1904. On March 17 the following order-book entry, omitting the formal parts, appears: "Come the defendants by W. R. Moore, and move for a *venire de novo*." It does not appear that any written motion was filed, or that reasons were assigned in its support. On June 24, from an order-book entry made on that day, we take the following: "And the court having considered the motion of defendants Thomas W. Douglas, Nettie B. Douglas and Sherman F. Culbertson for a *venire de novo*, now overrules the same, to which ruling of the court said defendants at the time except separately and severally, and said defendants also jointly except to said ruling." Thereupon the court rendered judgment setting aside the award of the appraisers, and in favor of Thomas W. Douglas and his wife, Nettie B. Douglas, for \$2,000,

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as their damages on account of the appropriation of a strip of ground, particularly describing it, being the same land described in the instrument of appropriation, and vesting the title thereto in appellee as and for a right of way for its railroad. The court also found that on August 12, 1903, appellee had paid to the clerk of the court, for the use of Douglas, Douglas, LeSeure and Culbertson, the sum of \$2,550 so awarded by the appraisers, which had been accepted as heretofore stated, and rendered judgment against Douglas and Douglas for \$550, with interest, making in all the sum of \$578.50, together with its cost from and including the filing of the exceptions. Appellants Douglas, Douglas and Culbertson filed their motion to modify the judgment by striking out all that part relative to the recovery by appellee of the \$550 and interest, for the reason (1) that that part of the judgment is without the issues; and (2) because, Douglas and Douglas being nonresidents of the State at the time of the bringing of this action, the pleadings do not authorize a personal judgment, and that the court had no jurisdiction over the person of each of the appellants to enter personal judgment. This motion was overruled and exceptions reserved.

Each appellant separately assigns the same errors and discusses the same questions.

(1) Our attention is called first to the motion for a *venire de novo*, the overruling of which is assigned as error.

A *venire de novo* is a common-law remedy, and by

1. it such defects only as may be apparent on the face of the record are presented. *Dolan v. State* (1890), 122 Ind. 141; *LaFollette v. Higgins* (1891), 129 Ind. 412, 418. While there has been some modification of this remedy in respect to special verdicts, the old rule still remains as to general verdicts (*Maxwell v. Wright* [1903], 160 Ind. 515), and defects appearing upon the face of the record. 2 Elliott, Gen. Prac., §985. There are a number of grounds upon which a *venire de novo* will be awarded,

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as, for instance, that the verdict on its face is so uncertain, ambiguous or defective that no judgment can be rendered thereon, or a failure to find upon the issues between the parties, or by not assessing damages, or on account of some material omission, or the wrongful allowance or disallowance of a challenge to a juror, and no doubt other grounds might arise sufficient to call this remedy into action, but the ones given will be sufficient to illustrate our purpose.

In the case at bar the motion was oral. The order-book entry and the bill of exceptions furnish the only evidence that such a motion was made. The order-book entry

2. copied in the record shows that it was joint, while the bill of exceptions assures us that it was several.

The record on this question is contradictory, and has furnished no little discussion as to which should control, the order-book entry or the bill of exceptions. On this point we have concluded to hold that the bill of exceptions should be considered as authentic, and will therefore control the order-book entry. *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, and cases cited.

In support of the right to make the motion orally, our attention is called to the case of *Swift v. Harley* (1898), 20 Ind. App. 614. In that case the motion was

3. written and reasons were assigned in its support.

The manner in which the motion was made was not before the court, and therefore what was said on the proposition of an oral motion was clearly dictum. Without deciding whether the motion must be in writing or may be made orally, it is sufficient to say, in either case, that the record must disclose the ground upon which it was based and pointed out to the trial court. This it does not do. The action of the trial court in overruling the motion is here for review. There one reason may have been assigned as a basis for the motion, and here another. The presumption is that the trial court correctly ruled upon the question

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as it was then presented, and the record being silent as to any reason urged in that court as a cause for granting the motion, the question on appeal will be deemed to have been correctly decided by it.

In Elliott, App. Proc., §763, in speaking of the requisites of a motion for a *venire de novo*, it is said: "It seems that good practice requires that the motion should specify with reasonable certainty the grounds upon which it is based. The true principle is that all such motions should specifically present the questions sought to be made, so that the court on appeal shall not be required to decide any other questions than those brought before the trial court." *Deatty v. Shirley* (1882), 83 Ind. 218, is cited in support of this principle, and from which case the following is quoted: "The motion itself specifies no objection to the verdict. The record fails to show that any defect was pointed out to the court at the hearing." If no defects were pointed out to the trial court, or grounds stated for such motion, there was no error in overruling it. *Borror v. Carrier* (1905), 34 Ind. App. 353.

(2) The overruling of the motion to modify the judgment is assigned as error. In the case at bar the effect of filing the exceptions was to set aside the report of

4. the appraisers, and the question of damages, being the only one before the court, was triable *de novo* regardless of the appraisal, and the burden was on the landowners to establish their damages. *Indiana, etc., R. Co. v. Cook* (1885), 102 Ind. 133; *Consumers Gas Trust Co. v. Huntsinger* (1895), 12 Ind. App. 285, and cases cited.

The payment of the award by appellee to the clerk gave appellee authority to take possession of the land for the purpose of constructing its road. Such payment

5. in nowise precluded either party on appeal from litigating the question of compensation or damages

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resulting from the taking of the land and the construction of the road. *Indianapolis, etc., Traction Co. v. Dunn* (1906), *ante*, 248, and cases therein cited.

To the instrument of appropriation Culbertson was made a party. He was given notice. He was called on to answer as to any interest he might have in the premises.

6. Upon a proper plea he was entitled to have his damages assessed and apportioned between the Douglasses and himself according to their respective rights. *Shauver v. Phillips* (1893), 7 Ind. App. 12, 14, and cases cited. He appeared, but failed to plead any interest in the land. By his neglect or refusal to set forth his interest, as he was called upon to do, he thereby assented to a recovery of all damages in favor of the Douglasses, not only as to the freehold, but the leasehold as well (*Shauver v. Phillips, supra*), and these damages, as assessed by the jury, were, in gross, \$2,000. We are unable to see how Culbertson would be interested in that part of the judgment directing Douglas and Douglas to repay to appellee the difference between the judgment for \$2,000 and the payment by it made for the purpose of obtaining the possession of the land pending the litigation, and therefore as to Culbertson there was no error in overruling the motion to modify the judgment.

The motion was properly overruled as to Douglas and Douglas. The question of damages was to be reviewed *de novo*. Appellee's payment to the clerk of the

7. appraisers' award was not in a legal sense voluntary. *Union Traction Co. v. Basey* (1905), 164 Ind. 249; *Indianapolis, etc., Traction Co. v. Dunn, supra*. Appellants' acceptance of this payment from the clerk was, as a matter of law, upon condition that they would return any excess so received over the amount of damages adjudged to be due on appeal. The amount of damages as found by the jury is not questioned. Appellee paid to the clerk \$550 in excess of appellants' damages, and it was

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entitled to have this excess returned. The method of enforcing the repayment of the excessive payment is a matter by statute left to the discretion of the trial court. The court is directed to "make such order therein as right and justice may require." In this instance the facts were all before that court. The rights of the parties to the excessive payment was as clearly a matter before the court for its order and disposition, to the end that a multiplicity of suits might be avoided, as was the matter of rendering judgment upon the verdict of the jury.

It is claimed that Douglas and Douglas were nonresidents, and for that reason personal judgment against them should not have been rendered. The reason as-

8. signed is not sufficient. They entered a full appearance and filed pleas in bar to the proceedings. All questions as to jurisdiction of their person were thereby waived. *New Albany Mfg. Co. v. Sulzer* (1903), 29 Ind. App. 89; *Ft. Wayne Ins. Co. v. Irwin* (1899), 23 Ind. App. 53; *Eel River R. Co. v. State, ex rel.* (1900), 155 Ind. 433.

(3) By motion appellants sought to have all the costs of this proceeding made after the filing of the exceptions taxed to appellee. It is by legislative authority that

9. costs are given or withheld. *Latshaw v. State, ex rel.* (1901), 156 Ind. 194; *Dearinger v. Ridgeway* (1870), 34 Ind. 54; *Smith v. State* (1854), 5 Ind. 541.

The legislature has designated the steps necessary in order to condemn lands for a right of way for street railroad purposes, and has clearly provided that all

10. costs of the proceedings up to and including the making of the award by the appraisers shall be paid by the company, except where the company shall, prior to the assessment of damages, tender to the landowner "an amount equal to the award afterward made, exclusive of costs, the costs of arbitration shall be paid equally by such

company and such owner." This is the only provision in the act relative to the payment of costs in condemnation proceedings for a right of way by street railroads. The question now under consideration has reference to the costs made by reason of filing the exceptions. Upon this particular question the particular act to which we have referred seems to be silent. We can account for this only upon the theory that such cases on appeal may be tried by a jury and are ranked as civil actions (*Lake Erie, etc., R. Co. v. Heath* [1857], 9 Ind. 558; *Woollen, Spec. Proc.*, §§266, 267); and that the lawmaking power had in view the statute already in force governing the payment of costs by parties to civil actions, which was deemed controlling and applicable to questions such as we now have under consideration. This conclusion is also supported by a number of decisions by our Supreme Court and this Court, holding that "the statute concerning the appropriation of land and assessment of damages (§893 *et seq.* *Burns* 1901, §881 R. S. 1881) and that providing for the condemnation of land by railroads must be construed *in pari materia*." *Indianapolis, etc., Traction Co. v. Dunn, supra*; *Swinney v. Ft. Wayne R. Co.* (1877), 59 Ind. 205; *Great Western, etc., Oil Co. v. Hawkins* (1903), 30 Ind. App. 557.

Section 924 *Burns* 1901, §912 R. S. 1881, provides: "Costs shall be awarded in all these cases, as in civil actions." Section 599 *Burns* 1901, §590 R. S. 1881, provides: "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law." By §603 *Burns* 1901, §594 R. S. 1881, a provision is made for the recovery of costs in favor of the party in whose behalf an issue is determined.

In view of the decisions of our appellate tribunals to the effect that proceedings to condemn land on appeal are civil actions, and our statutory provisions applicable to costs in such actions, we are led to inquire, what are the issues presented by the appeal, and how were they decided?

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In the case at bar the issue was formed by the affirmative allegation, that the damages assessed by the appraisers were excessive, answered by a general denial. These pleadings formed a single issue for the jury, to be tried as any other case. *Chicago, etc., R. Co. v. Winslow* (1901), 27 Ind. App. 316. Appellants' general denial affirmed the damages awarded by the appraisers. The verdict of the jury was for \$2,000, and, being \$550 less than the appraisers award, was therefore a finding in appellee's favor upon this issue, thereby entitling it to recover the costs made on account of the trial thereof. *Hawkins v. Stanford* (1894), 138 Ind. 267; *Steele v. Empson* (1895), 142 Ind. 397.

Judgment affirmed.

CATTERSON ET AL., BY NEXT FRIEND, v. HALL ET AL.

[No. 5,559. Filed February 15, 1906.]

1. **TRIAL.—Answers to Interrogatories to Jury.—Judgment non Obstante on Certain Answers.**—Judgment non obstante can not be rendered on certain interrogatories to the exclusion of the others, but all must be considered. p. 346.
2. **SAME.—General Verdict.—Effect.**—A general verdict for plaintiff establishes all facts necessary to a recovery in his favor, and establishes all facts against defendant necessary to a recovery on his cross-complaint. p. 347.
3. **SAME.—Quieting Title.—Interrogatories to Jury.—Conflict.**—In a suit by heirs to quiet their equitable title to real estate, an answer to an interrogatory to the jury, that such land was of the value of \$600 before any improvements were added by the holders of the legal title, is not in conflict with a general verdict for plaintiffs. p. 349.
4. **SAME.—Quieting Title.—Interrogatories to Jury.—Conflict.—Notice.**—In a suit by heirs to quiet their equitable title to real estate, an answer to an interrogatory to the jury, that defendant, who was husband of the holder of the legal title, did not know, when his wife made certain improvements thereon, that her grantor held such property in trust for her and plaintiffs,

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is not in conflict with a general verdict for plaintiffs, since it does not negative notice sufficiently to put defendant upon inquiry. p. 349.

5. TRIAL.—*Quieting Title.—Fraud.—Interrogatories to Jury.—Conflict.*—In a suit by heirs to quiet their equitable title to real estate, an answer to an interrogatory to the jury, that the jury did not know that the ancestor had no intention to defraud his creditors when he conveyed the property to a legal holder, through whom defendant claims, is not in conflict with a general verdict for plaintiffs, being a negation of a fact, the law requiring an affirmation. p. 349.
6. TRUSTS. — *Resulting. — Deeds. — Parol Contracts. — Statutes.* —Where the purchaser of real estate pays the consideration therefor and by a parol contract the deed therefor is taken in the name of another in trust for the purchaser, a resulting trust is thereby created under §3398 Burns 1901, §2976 R. S. 1881. p. 350.
7. APPEAL AND ERROR.—*Rendering Final Judgment.*—Where a cause has been in litigation several years and the answers to the interrogatories to the jury and the general verdict outline the respective rights of the parties, and the result of another trial would probably not be different, the Appellate Court will render a final decree. p. 350.

From Marion Circuit Court (9,797) ; *Henry Clay Allen*, Judge.

Suit by Harvey Catterson and another against George W. Hall and others. From the decree rendered, plaintiffs appeal. *Affirmed in part and reversed in part.*

Harding & Hovey, for appellants.

Taylor & Woods and *Romney L. Willson*, for appellees.

WILEY, J.—Suit to quiet title, in which appellants were plaintiffs below. Their complaint was in two paragraphs, the first of which was in the ordinary form for actions of this character. The second paragraph set out in full the facts upon which they based their action and claim title. In it they averred that on the 19th of September, 1890, Scott Catterson, their father, purchased certain real estate, to wit: Lot twenty-six in E. T. Fletcher's second Brookside addition to Indianapolis, and had the same conveyed

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to Artemus Leffingwell; that on the 30th day of April, 1891, at the request of said Scott Catterson, said Leffingwell, his wife joining him therein, executed and recorded in Marion county, Indiana, a subdivision of said real estate into lots; that said Catterson caused said real estate to be conveyed to Artemus Leffingwell in trust for him; that the purchase money therefor was paid by said Catterson, and an oral agreement made between him and said Leffingwell that the latter should hold said real estate in trust for the former; that said agreement was made without any fraudulent intent on the part of either of them to cheat, hinder or delay the creditors of said Catterson, or of any person, and without any fraudulent intent whatever; that said Catterson died, intestate, May 29, 1891, being a resident of Marion county, Indiana, at the time of his death, and left surviving him Ida J. Catterson, his widow, and the appellants, his children and sole heirs at law; that after the death of said Catterson his widow urged said Leffingwell, who was her father, to convey said real estate to her, and became so persistent in her demands that he did, on the 3d day of October, 1892, convey the same to her without any authority for so doing under said trust; that she paid no consideration for such conveyance; that it was wholly without consideration, except as to such part of such premises as she was entitled to as the widow of her deceased husband; that thereafter, on the 24th day of December, 1892, said Ida J. Catterson intermarried with appellee George W. Hall; that thereafter, on the 16th day of July, 1896, she being sick and not expected to live, said Hall caused instruments to be drawn up, one purporting to be a conveyance by said Ida J. Hall and himself to Henry Wiel, by which appellee Hall claims that all said real estate was conveyed to said Wiel, and the other, a deed executed by said Wiel purporting to convey the same real estate to said Hall for an expressed consideration of \$5; that in fact no consideration whatever was paid to said Ida J.

Catterson for the conveyance of said real estate to Wiel, and that said deed, if executed at all, was executed without any consideration whatever; that at the time said deed was made said Hall knew that said Leffingwell had held said real estate as trustee for Scott Catterson, and after his death for his legal heirs, and not otherwise, and that he had no right to convey the same to said Ida J. Catterson; that by reason of said conveyance said George W. Hall now claims to be owner in fee simple of all of said real estate; that afterwards, to wit, on October 29, 1896, said Ida J. Hall departed this life, and that thereafter said George W. Hall intermarried with his co-appellee — Hall. Appellants then averred that said real estate belonged to their said father in his lifetime, and that through his death they each severally inherited the one-third part of said real estate in fee simple, and that their mother, Ida J., inherited the one-third part thereof, subject to the law of descent upon her remarriage, and that said Ida J. Hall could not, during her subsequent marriage, alienate any interest held by her in said real estate, and that upon her death appellants, as the children and heirs at law of said Scott Catterson, inherited from said Ida J. Hall the one-third part of said real estate which was inherited by her from her former husband.

As to the complaint, the cause was put at issue by an answer in denial. The appellee George W. Hall filed a cross-complaint, setting up ownership to the real estate in controversy by deeds executed by his deceased wife and himself to Henry Wiel, in trust, and by said Wiel, as such trustee, back to him. In his cross-complaint he avers that his said wife, before her marriage to him, had purchased the real estate from her father, Artemus Leffingwell; that at the time of said conveyance to said Ida J. the only improvement upon said lots was a small three-room house, and that to purchase said lots and pay off the mortgage resting against the same she borrowed \$500 from one

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Sterne, the payment of which was secured by mortgage on the property; that such cross-complainant paid off said mortgage, and said Ida J. Catterson, in good faith, made valuable improvements upon said lots, converting said cottage into a ten-room dwelling-house, in the years 1895 and 1896; that said improvements were of a lasting character, and cost \$1,200; that the cross-complainant afterward put a furnace of the value of \$150 in the house; that he paid sewer assessments against said lots in the sum of \$120, street improvements in the sum of \$108, improvements to the sidewalks in the sum of \$220, and taxes aggregating \$167.20, and that all of said sums of money were paid out in good faith, and he prayed that he be allowed for said improvements, and that he have a prior, superior, and permanent lien on said lots "before any execution shall issue upon the complaint." An answer in denial was filed to the cross-complaint. Upon the issues thus joined the cause was submitted to a jury for trial, resulting in a general verdict for appellants, and finding that there was due appellee George W. Hall the sum of \$2,200. With their general verdict the jury answered interrogatories submitted to them. Appellants' motion for judgment in their favor and against said appellee, on the general verdict, was overruled.

Appellee George W. Hall moved in writing for judgment on interrogatories one, thirteen and sixteen, in his favor, notwithstanding the general verdict. This motion was sustained. Appellants moved in writing to modify the judgment, and their motion was overruled. Their motion for a new trial was also overruled. They also moved for judgment in their favor and against the cross-complainant, on his cross-complaint, for costs upon and on account of the answers of the jury to the interrogatories submitted to and answered by them notwithstanding the general verdict, and this motion was also overruled. All these rulings adverse to appellants are assigned as errors.

The first question discussed by counsel relates to the action of the court in rendering judgment in favor of appellees on the answers to interrogatories. His motion

1. for judgment was in writing, and was directed specifically to the answers to interrogatories one, thirteen and sixteen. Under §556 Burns 1901, §547 R. S. 1881, "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." The only reasonable construction that can be given to this section of the statute is that all of the facts specially determined by answers to interrogatories which are pertinent to the issues must be taken and construed as a whole, and, when thus construed they are inconsistent with the general verdict, they will control the latter, and judgment shall be given accordingly. It is the first time within our knowledge where one or more of the answers to a series of interrogatories have been singled out and a motion for judgment based upon them, to the exclusion of all other answers. It is only when the answers to interrogatories, taken and considered as a whole, are inconsistent with the general verdict, that the former will overcome the latter. To pass intelligently upon the question here involved, we should have before us all the facts pertinent to the issues which are established by the answers to interrogatories. Before reciting these facts, however, it is proper to say that the appellee Hall claims title to the property in controversy by virtue of conveyances directly to him from his wife, formerly Ida J. Catterson, through a trustee. In his cross-complaint, also, he avers that he made valuable improvements on the property under a claim of ownership in good faith, and without any knowledge that appellants had any interest in it.

As to all of the material facts tendered by the complaint of the appellants, and the cross-complaint of appellee Hall,

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the jury found by their general verdict in favor of
2. appellants, and against said appellee, except that as to his cross-complaint the jury found that said appellee had a lien upon the property for improvements made thereon under claim of ownership, which was superior and paramount, and that the same should be paid "before any execution shall issue upon the complaint."

By their answers to interrogatories the jury found specially the following facts: The value of lot one in Leffingwell's subdivision of lot twenty-six, etc., in the fall of 1896, before any improvements were added thereto by Ida J. Hall, was \$600. The value of all the lasting improvements made on said lot by Ida J. Hall and George W. Hall, prior to the commencement of this action, was \$1,000. The fair value of the rents and profits that would have accrued from said lot one, with the three-room house thereon, as it was in the fall of 1896, without the additional improvement thereto, was \$387. The value of the estate which appellants have in all the property described in their complaint, without the improvements placed thereon by said Halls, was \$1,725. The value of the estate which appellants have in lot one, without the improvements, taxes and municipal improvement liens paid by Hall, or his former wife, is \$600. The value of the estate which appellants have in lot eleven of said subdivision, without the improvements, taxes, etc., paid by the Halls, is \$225. The value of the estate which appellants had in lots seven, eight, nine and ten in said subdivision at the time of the trial was \$1,200. Scott Catterson bought the real estate in controversy, and caused the same to be conveyed to Artemus Leffingwell, with an agreement with said Leffingwell that he should hold the same in trust for said Catterson and his heirs. Said Scott Catterson paid the purchase money in part for said real estate. Ida J. Catterson at the time she made improvements on lot one knew that her former husband, Scott Catterson, had bought the property and caused

it to be conveyed to Artemus Leffingwell in trust for said Catterson and his heirs. Mrs. Catterson paid off the \$450 mortgage held against it by one McWhinney. Appellee Hall did not pay off the mortgage on the property in controversy, given by Mrs. Catterson to William Sterne.

The answers to the three interrogatories upon which appellee Hall asked judgment notwithstanding the general verdict we give in full, in connection with the interrogatories to which they are responsive: "(1) What was the value of lot one in A. Leffingwell's subdivision of lot twenty-six in Fletcher's Brookside addition, with the improvements thereon, in the fall of 1896, before any improvements were added thereto by Ida J. Hall? A. \$600." "(13) Did George W. Hall know, at the time the improvements were made by his wife, Ida J. Hall, that the property had been held by Artemus Leffingwell in trust for Scott Catterson and his heirs? A. No." "(16) Do you know, from the evidence, that Scott Catterson had no intention of defrauding or hindering creditors in placing the property herein in controversy in the name of Artemus Leffingwell? A. No."

By the general verdict the jury declared that, as to their complaint, appellants had established by the evidence every material fact essential to their right to recover; *i. e.*, the general verdict declared that Scott Catterson purchased the property, paid a part of the consideration, had it conveyed to Artemus Leffingwell in trust, for himself and heirs, and that he had no intent to hinder or delay his creditors. The general verdict further found that Leffingwell, at the request of Catterson, subdivided the real estate into lots. Catterson died intestate, leaving as his sole heirs his widow and appellants. Ida J. Catterson, without paying any consideration therefor, procured Leffingwell to convey the property to her. She intermarried with appellee Hall. Said Hall, while his wife was sick and not expected to live, induced her to convey the property to him, for which

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he did not pay any consideration. He knew that the property was held in trust by Leffingwell for Catterson and his heirs. By the general verdict it was also found that appellants were the equitable owners of the real estate, subject to the rights of appellee Hall as occupying claimant.

As to the answer to interrogatory one, it can not,

3. with any reason, be maintained that it is in conflict with the general verdict.

As to the answer to interrogatory thirteen, it may be said that it does not establish any fact pertinent to the issues.

By the answer the jury simply declare that George

4. W. Hall, at the time his wife made certain improvements, did not know that Leffingwell held the property in trust, etc. The answer does not exclude the fact that he might have had notice sufficient to put him upon inquiry. Knowledge and notice are not synonymous terms. *Kirkhan v. Moore* (1903), 30 Ind. App. 549.

By the answer to interrogatory sixteen the jury simply say that they did not know that Catterson "had no intention of defrauding," etc., in having the property

5. deeded to Leffingwell. At most, the answer goes no further than to establish a negative fact, which in nowise conflicts with the general verdict.

Counsel for appellees, while they admit that their motion for judgment went only to the answers to interrogatories one, thirteen and sixteen, concede that, in ruling upon the motion, it was the duty of the trial court to consider all the answers. By a careful consideration of all the answers to interrogatories we are led to the conclusion that they are supportive, rather than destructive, of the general verdict. The evidence amply supports the general verdict. It is clearly exhibited by the evidence that Ida J. Hall knew that her father held the real estate in trust, under an agreement with Scott Catterson, and there is some evidence from which the jury could have reached the conclusion that ap-

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pellee George W. Hall had notice of that fact. Whatever puts a party upon inquiry amounts to notice. *Blair v. Whittaker* (1903), 31 Ind. App. 664.

From the facts in this case, under the provisions of §3398 Burns 1901, §2976 R. S. 1881, and the authorities, a resulting trust was created in favor of appellants.

6. *McDonald v. McDonald* (1865), 24 Ind. 68; *Rhodes v. Green* (1871), 36 Ind. 7; *Brannon v. May* (1873), 42 Ind. 92; *Hampson v. Fall* (1878), 64 Ind. 382; *Boyer v. Libey* (1882), 88 Ind. 235; *Derry v. Derry* (1884), 98 Ind. 319; *Stringer v. Montgomery* (1887), 111 Ind. 489; *Glidewell v. Spaugh* (1866), 26 Ind. 319; *Marcilliat v. Marcilliat* (1890), 125 Ind. 472; *Hill v. Pollard* (1892), 132 Ind. 588; *Toney v. Wendling* (1894), 138 Ind. 228.

We are clear that appellees are not entitled to a judgment in their favor upon the answers to interrogatories, and it was, therefore, error to sustain their motion therefor. This conclusion makes it unnecessary to consider any other questions discussed.

The record shows that this cause has been twice tried, and has been pending since May 26, 1899. In the interest of all the parties the litigation should end at the

7. earliest possible moment. We do not believe that the respective rights of the parties demand another trial, nor that a different result would be reached. The cause now stands as if no motion for judgment on the answers to interrogatories had been made, and leaves the general verdict in force.

The judgment is therefore reversed, and the trial court is directed to overrule appellees' motion for judgment on the answers to interrogatories, set aside and vacate the judgment rendered thereon, and render judgment on the general verdict in favor of appellants on their complaint, and in favor of the appellee George W. Hall on his cross-complaint as occupying claimant.

HANCOCK v. DIAMOND PLATE GLASS COMPANY ET AL.

[No. 5,435. Filed November 1, 1905. Rehearing denied January 4, 1906. Transfer denied February 15, 1906.]

1. **APPEAL AND ERROR.—Law of the Case.**—The law as declared on a former appeal is the law of the case, so far as applicable to the facts, through all subsequent stages. p. 359.
2. **LANDLORD AND TENANT.—Leases.—Gas-and-Oil Rights.**—The rights of the parties to a lease, which provides for an annual rental payment until wells are sunk and for a different payment after development, are not the same before and after development, the right of the landlord to terminate the lease for failure to develop not being available after development. *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346, and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124, explained. p. 359.
3. **APPEAL AND ERROR.—Law of the Case.—Dismissal.—New Action.**—Where the plaintiff, after a reversal by the Appellate Court, dismissed her action without prejudice, and afterwards filed an action for substantially the same cause, she is bound by such prior decision as the law of the case. p. 361.
4. **SAME.—Law of the Case.—Pleadings.—Evidence.**—Where it appears by the evidence in the prior case that the new allegations in a subsequent case were considered in the prior case, a decision of the prior case on appeal is the law of the subsequent case. p. 361.
5. **EVIDENCE.—Records.—Judicial Notice.**—Appellate courts take judicial notice of their own records, either upon their own motion or at the suggestion of counsel. p. 362.
6. **LANDLORD AND TENANT.—Leases.—Gas and Oil.—Part Performance.**—Where a landlord leases his lands, the lessee agreeing to pay an annual rental until the land is developed and after development to pay a different sum, such lessee agreeing also to furnish to such landlord free gas, the furnishing of such gas, where no well was ever drilled and no offer made to drill one, does not constitute the taking possession for the purposes of the lease nor is it a part performance of the contract. p. 362.
7. **APPEAL AND ERROR.—Law of the Case.—Wrongful Decision.**—Although a prior decision of the case was wrong, it remains the law of the case through all subsequent stages. p. 363.

From Grant Superior Court; *B. F. Harness*, Judge.

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Action by Anna E. Hancock against the Diamond Plate Glass Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

B. C. Moon, for appellant.

Blackledge, Shirley & Wolf, for appellees.

ROBINSON, J.—Action by appellant to recover acreage rental upon a natural gas lease. Upon a special finding of facts the court stated a conclusion of law in appellee Diamond Plate Glass Company's favor. The correctness of the conclusion of law is the only question presented.

The facts found are in substance as follows: On July 23, 1889, appellant owned in fee and was in possession of certain land, and on that date, her husband joining, she executed to the Diamond Plate Glass Company, of Indiana, a gas-and-oil lease on the land, in two parts, the lease providing, among other things, that the lessee should have the right of ingress and egress to and from the tracts on which wells were to be located, the right to use the highways adjoining any part of the premises for the laying of mains and pipes for the transportation of gas, the lessee "to deliver free of charge to said first party, during the continuance of this lease, natural gas necessary for domestic use for dwelling-house now on said premises, or that may be hereafter erected thereon, not exceeding one," the gas to be delivered in a main or pipe at the house, the lessee to furnish, at the railroad, pipes necessary for conducting the gas and a superintendent to lay the same, the mains to belong to the lessee, the lessor to lay the pipes and make all necessary attachments. All gas obtained should be used in Howard county. "This grant and lease shall be deemed to commence at and run from the date of the signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes in Howard county, Indiana, or whenever the second party, its heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming

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due, and, in the event of the termination thereof, for any cause, all rights and liabilities hereunder shall cease and terminate. And, as an additional consideration, said second party agrees to pay to said first party an annual rental of \$100 each year for each gas-well drilled as aforesaid which produces gas in paying quantities sufficient for manufacturing purposes, said payments, as to each of said gas-wells, to commence and become due and payable on the first day of January after the completion thereof, and to continue thereafter annually during the continuance of this lease. Until the drilling of a gas-well on said premises by said second party it shall pay to said first party an annual rental of fifty-hundredths dollars an acre to be paid on the 1st day of January of each year, commencing 1891." If wells were not drilled in five years the rental to be \$1 an acre. "Should any other gas-well or wells be put down on said 54.60-acre tract of land, other than herein stipulated for, then said second party, its heirs or assigns, shall thereafter be relieved and released from the payment of the rentals as in this contract provided. This contract shall extend to and be binding upon the heirs, executors and assigns of the parties thereto." In the second agreement, made on the same day, the lessor agreed not to drill or permit others to drill on the land during the continuance of the lease, and in case any other wells were put down the lessee and assigns should thereafter be released from the payment of any rentals; but otherwise the lessee's rights should not be affected. On October 13, 1890, the Diamond Plate Glass Company, of Indiana, assigned the lease to the Diamond Plate Glass Company, of Illinois, which latter company on April 1, 1895, assigned the lease to the Pittsburg Plate Glass Company, which company agreed to perform all the terms and conditions of the lease and pay all rentals thereafter maturing under the lease. On September 19, 1895, the Pittsburg company assigned the lease to the Logansport & Wabash Valley Gas Company, which

company held the lease until the surrender thereof. The Logansport company agreed to perform all the conditions of the lease and pay all rentals thereafter maturing. The assignment of the lease from the Diamond Plate Glass Company, of Illinois, to the Pittsburg Plate Glass Company, and from that company to the Logansport & Wabash Valley Gas Company, also embraced the assignment and conveyance of all gas lines situated within the territory covered by the leases thereby assigned which were used for supplying gas to the lessor. The Diamond Plate Glass Company, of Indiana, and the Diamond Plate Glass Company, of Illinois, entered upon the land and laid in the highways thereof pipes for the transportation of natural gas, and maintained the same until the assignment of the lease to the Pittsburg company, which company, when it became owner of the lease, entered upon the land for the purpose of maintaining thereon in the highways such pipes, and continued to maintain the same until it assigned the lease to the Logansport company, which company, when it became the owner of the lease, entered upon the land and maintained in the highways such pipes, and maintained upon and across the land in the highway, from the time it became the owner until December, 1900, about ten rods of one-inch pipe, which it continuously used for the transportation of gas produced elsewhere, and such pipe was a service-pipe used by appellees to furnish natural gas free of charge to the lessor under the lease. No gas or oil well has been drilled at any time upon the land, and no one of the holders of the lease ever offered to drill or put down any well, although appellant was always ready and willing for such well to be drilled by any of the holders of the lease at any time when the lease was in force. The rent maturing under the terms of the lease on January 1, 1891, 1892, 1893, 1894 and 1895 was paid, but the rent claimed by appellant as maturing on January 1, 1896, 1897, 1898, 1899 and 1900 is unpaid. Natural gas was used generally for manufactur-

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ing purposes in Howard county from the time of the execution of the lease until the spring of 1902. Appellant has performed all the conditions of the contract on her part. The several holders of the lease furnished appellant natural gas, free of charge, necessary for domestic use for the dwelling-house on the land, from a date immediately after the execution of the lease to the latter part of December, 1900, according to the contract, but the Logansport & Wabash Valley Gas Company, on or about December 25, 1900, cut off the supply of gas to the house and removed its pipes and fixtures from the land, and has not since that date furnished appellant with gas or exercised any rights in the land under the lease. On January 6, 1900, the Logansport & Wabash Valley Gas Company signed, acknowledged and caused to be recorded a release of all rights under the lease, and the county recorder entered upon the margin of the lease, where the same was recorded, a reference to such cancelation. About the first day of January, 1896, the Logansport & Wabash Valley Gas Company, through its general manager, decided to terminate the lease, claiming the right to do so under the clause providing: "This grant and lease * * * shall be deemed to have terminated * * * whenever the second party, its heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due, and, in the event of the termination thereof, for any cause, all rights and liabilities hereunder shall cease and terminate." Pursuant to such election, or shortly thereafter, it notified appellant through its field man of such election, and that it would not thereafter continue the lease in force nor pay any rentals, but that the same was then and thereafter null and void. From and after January, 1896, the Logansport company has continuously refused to pay any rentals, and has never since that date claimed to hold any rights under the lease, but appellant has during that time refused to consent to the termination of the

lease and denied such appellee's right so to terminate the same until about December, 1900. On February 24, 1896, after appellant had been informed that the Logansport company claimed the lease to be no longer in force, on the ground that the same had been terminated by it under the above provision, appellant filed before a justice of the peace a complaint for rentals alleged to be due under the contract sued on in this case upon January 1, 1896, and the appellees Diamond Plate Glass Company, of Indiana, and the Pittsburg Plate Glass Company were made parties defendant. The complaint in that case alleged that at the date thereof the plaintiff therein and the plaintiff herein was the owner in fee and in possession of the real estate described in the complaint herein, and in that case and in the lease filed as an exhibit the plaintiff executed to the Diamond Plate Glass Company, of Indiana, a gas lease on the land, which was accepted by the company, by the terms of which lease the company agreed to pay to the plaintiff an annual rent of \$54.60, to be paid on the 1st day of January, 1895, and each year thereafter until a well was drilled, but that no well had been drilled. The rental due January 1, 1896, was due and unpaid. In 1890 the lease was assigned by the lessee to the Diamond Plate Glass Company, of Illinois, which company on April 1, 1895, assigned the lease to the Pittsburg Plate Glass Company, by the terms of which assignment the assignee agreed, as part of the consideration, to perform all the terms of the lease and pay all rentals thereafter accruing which defendants had failed and refused to do. A copy of the lease was filed with and made part of the complaint, and demand for judgment for such rental was made. The lease filed as a part of that complaint was a copy of the part of the lease sued on in this action, which is first set out above, and no mention was made in the former suit of the second agreement above set out, and no averment was contained in the complaint in the former case as to possession taken

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under the lease of any part of the land or of any part performance of the terms thereof by appellees or any of them. Counsel were employed by the Logansport & Wabash Valley Gas Company to appear in that action in behalf of the defendants, which counsel did appear and defend, but judgment was rendered against the defendants by the justice for the amount claimed by the plaintiff, from which judgment the defendants appealed to the Howard Circuit Court, and afterwards had the cause transferred on change of venue to the Tipton Circuit Court. In the last-named court the defendants filed a demurrer to the complaint, which was overruled. They filed a cross-complaint, alleging that the cross-complainant Logansport company was the holder of the lease, that the lease was null and void for uncertainty in the description of the land, that the cross-complainant had never been in possession of, nor drilled any well upon, the land, that the plaintiff claimed the lease was valid, and was then prosecuting an action to collect rentals, and was threatening to prosecute other actions against the cross-complainants on the lease, and praying that the lease be declared null and void and for an injunction. A motion to strike out this cross-complaint was sustained. Upon the trial of such cause it was the theory of the defendants that the lessees had the right to terminate the lease January 1, 1896, and had so terminated the same under the clause of the lease above set out, and that the failure to pay, for the period of sixty days after it became due, the rent accruing in 1896 was of itself notice of such termination. The theory of plaintiff being that the clause for the termination of the lease upon the failure to pay rent within sixty days was for the benefit of the plaintiff, and that the lessees had no right to terminate the lease, it being further contended by the defendants that the contract was for an indefinite period and therefore at most a tenancy from year to year, which might be terminated by the lessees at the end of any year without notice. Upon the trial of the cause

a finding and judgment was made in favor of the plaintiff for the sum claimed, from which judgment the defendants appealed to the Appellate Court, which reversed the cause and remanded the same to the Tipton Circuit Court, whereupon the cause was dismissed by the plaintiff at the April term, 1900, of that court. The cause entitled *Diamond Plate Glass Co. v. Hancock* (1900), 24 Ind. App. 701, is the same cause as that originally brought by the plaintiff and dismissed as above stated. The original case brought by the plaintiff was one of a series or number of cases instituted about the same time by a number of landowners acting in concert, of whom appellant was one, against appellee Diamond Plate Glass Company, for the collection of rentals alleged to be due under gas and oil leases executed by such landowners to such appellee. During the pendency of such action, and until in December, 1900, the Logansport & Wabash Valley Gas Company continued to furnish free gas to appellant, as above set out. In the Appellate Court the original cause was presented by counsel for the respective parties upon the respective theories above referred to, and in the decision of the cause it was adjudged: "The questions presented on this appeal are the same as those in *Diamond Plate Glass Co. v. Curless* [1899], 22 Ind. App. 346, and in *Diamond Plate Glass Co. v. Echelbarger* [1900], 24 Ind. App. 124, and upon the authority of these cases the judgment is reversed." *Diamond Plate Glass Company v. Curless, supra*, was one of such series being prosecuted by such several landowners for the purpose of enforcing and continuing the respective leases on their several lands; the contract sued on in the *Curless* case being substantially identical with that sued on originally by appellant herein. The case of *Diamond Plate Glass Co. v. Echelbarger, supra*, was one of such several suits so being prosecuted, and the contract therein sued on was substantially identical with that sued on in the case of

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Diamond Plate Glass Co. v. Curless, supra, and in the original suit brought by appellant, except that in the Echelbarger case the contract further provided that the lessor should not "drill or suffer or permit others to drill or put down any other gas-well or wells on any part of the 100-acre tract 'during the continuance of said lease.'" The findings also set out extracts from the opinions in the Curless case and the Echelbarger case, and that the amount due appellant, if entitled to recover, is \$376.60.

It is argued by counsel for appellees that the law in this case was established on the former appeal. *Diamond Plate*

Glass Co. v. Hancock, supra. That appeal was decided upon the authority of *Diamond Plate Glass Co. v. Curless, supra*, and *Diamond Plate Glass Co. v. Echelbarger, supra*, and it is argued that the law of this case is the law as established in those two decisions. It is well settled that principles of law declared upon a former appeal remain the law of the case, so far as applicable, through all subsequent steps taken in the cause, and must be followed whether right or wrong. In *Hawley v. Smith* (1873), 45 Ind. 183, 201, it is said: "It having been held in the former action between the same parties, on the same cause of action, that the relation of principal and agent existed, we should regard the question as *res adjudicata* between the parties. This should be the rule, even if we doubted the correctness of the ruling when applied to other cases." See *Lillie v. Trentman* (1891), 130 Ind. 16; *Phenix Ins. Co. v. Rogers* (1894), 11 Ind. App. 72.

We do not understand it to be held in either the case of *Diamond Plate Glass Co. v. Curless, supra*, or the case of *Diamond Plate Glass Co. v. Echelbarger, supra*,

2. that the principles pertaining to the relation of landlord and tenant are applicable to the contracts there in question whether possession has or has not been taken

under the contract. It was expressly held in the Curless case that possession never having been taken it could not be said that the relation of landlord and tenant ever existed. In the Echelbarger case possession was taken, and it was held that a tenancy was created, and, as the instrument did not fix its duration, the statute provides that it shall be from year to year. In the leases in question in those two cases a consideration was expressed for the privilege of going upon the land and developing it for gas and oil, and an entirely new and different consideration in the event the land was developed and gas or oil was found. It manifestly was not the intention of the parties that this privilege could be continued indefinitely at the option of either party. When possession was taken by drilling a well that produced gas in paying quantities, a new consideration was named, and the lease very clearly shows the length of time the parties intended it should continue. But possession might be taken and the land remain undeveloped, and while it does appear in the case of *Diamond Plate Glass Co. v. Echelbarger, supra*, that possession was taken, it does not appear that possession was taken and the land developed for oil or gas.

That the rights of the parties to the lease as to its continuance and termination are not the same under the lease before and after the development of the land for gas and oil, we think is plain from the decisions. In *Consumers Gas Trust Co. v. Littler* (1904), 162 Ind. 320, it is held that the option or right to drill, which seems to have run from year to year, might be terminated by the lessor by his refusal to accept the annual payment for another year, provided that the lessee was given such reasonable notice as would afford him a fair chance to discharge his obligation; and in *Hancock v. Diamond Plate Glass Co.* (1904), 162 Ind. 146, under a lease providing an annual rental for each producing gas-well, it is held that, if the lessee has taken possession and drilled a well more valuable than the

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lessor anticipated when he made the lease, the lessor could not arbitrarily terminate the lease by refusing to accept the annual rental.

Upon the former appeal the judgment was reversed, and after the cause was remanded the case was dismissed. After-

ward the action was again brought to recover the

3. same rent for 1896 sought to be recovered in the former suit, and also the rent for the four succeeding years. The complaint in this action is substantially the same as upon the former appeal, except that the former complaint did not aver possession by the lessee and part performance of the lease, while the complaint in this appeal does. It is true the dismissal after the former appeal was without prejudice, but we fail to see any sufficient reason for holding that appellant is in a better position after having dismissed the case and refiled it with additional averments in her complaint than she would have been had she added these additional averments by amending the original pleading and appealed a second time without dismissing.

Counsel for appellant argues that, if this case is governed by the law of the case as declared on the former appeal, such law of the case extends only to the law upon the facts as there pleaded; and that the complaint in that case did not aver possession by the lessee or part performance of the lease, while in this case the complaint avers both.

The case decided on the former appeal originated before a justice of the peace, and while the pleadings do not disclose that the questions of possession and part per-

4. formance were presented by the pleadings, yet an examination of the record of that appeal discloses that those questions were presented, without objection, by the evidence.

It is held that an appellate tribunal takes judicial notice of its own records, and that it may, in the consideration of

a case before it, either on its own motion or at the
5. suggestion of counsel, inspect its records. *Cluggish v. Koons* (1896), 15 Ind. App. 599; *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.* (1895), 160 U. S. 101, 40 L. Ed. 355, 16 Sup. Ct. 239; *Denney v. State, ex rel.* (1896), 144 Ind. 503, 31 L. R. A. 726. In the case last cited the court said: "Some question having been made as to whether we can thus take notice of other records in this court, in considering a case at bar, we may here remark that we have no doubt that this may be done, whether the court make such inspection of its own motion or on the suggestion of counsel."

The findings show that no gas or oil well has been drilled at any time upon the land, and that no one of the holders of the lease ever offered to drill or put down any
6. well; that is, possession was not taken by developing the land for oil and gas. It was found that pipes for the transportation of gas were laid and maintained in the highway and that the several holders of the lease furnished appellant free gas for the dwelling-house on the land. This finding is substantially the same as the undisputed evidence as to these questions upon the former appeal. On the former appeal it was held that this did not constitute possession. It is true, the finding states that the several holders of the lease furnished appellant free gas until the latter part of December, 1900, "as above found." But this apparent conclusion is to be considered in connection with the primary facts found. And when these primary facts are considered together with the language used in the above finding, we do not think the court intended to find that there had been a part performance of the contract by the furnishing of free gas. If appellees had the right to terminate the lease and had terminated it, under the law of the case, we fail to see how the continued use of gas by appellant from appellees' pipes could impose upon appellees the consequences of a part performance of the lease.

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In *Diamond Plate Glass Co. v. Curlless*, *supra*, it is said: "As we construe the instrument in question, it was an agreement whereby appellants, until possession was taken by them, agreed to pay an annual sum for the right to go upon the land at any time within the year and prospect for gas and oil; that the agreement ran only from year to year; and that, at the end of any year, either party could terminate the agreement, the one by refusing to accept, and the other by refusing to pay the stipulated sum. * * * Possession never having been taken, by the terms of the instrument, it can not be said that the relation of landlord and tenant ever existed. * * * Construing the instrument in question, as we do, to be an agreement whereby a right was granted for a stipulated sum payable from year to year, and continuing from year to year if both parties desired that it should so continue, it could be terminated by either party at the expiration of such period, and a failure to pay the stipulated sum as provided in the agreement, or a refusal under the terms of the agreement to pay such sum, would work its termination."

This doctrine was disapproved in the case of *Hancock v. Diamond Plate Glass Co.* (1904), 162 Ind. 146, and is of

no effect, except so far as it is to be applied as the

7. law of the case. It is quite clear that under the rule declared in that case appellant would be entitled to recover in this action. But the law declared upon the former appeal, although wrong, remains the law of the case, so far as applicable, upon this the second appeal. See *Board, etc., v. Bonebrake* (1896), 146 Ind. 311.

Judgment affirmed.

BAKER v. GOWLAND ET AL.

[No. 5,542. Filed February 20, 1906.]

1. **APPEAL AND ERROR.**—*Motion to Withdraw from Highway Petition.*—*Exceptions.*—Where certain signers of a highway petition moved to withdraw their names from such petition, but no action was taken thereon and no exception of any kind taken, no question is presented. p. 366.
2. **SAME.**—*Appellate Court Rules.*—*Briefs.*—Where appellant fails to set out literally or substantially the questioned complaint in his brief, and suggests no objection thereto, no question thereon is presented. p. 367.
3. **HIGHWAYS.**—*Viewers' Reports.*—*Enclosures.*—Viewers' reports setting out the established line of the proposed highway and stating that certain enclosures were found, the owners of one of which consented to the establishment of the highway and the other refused consent, are in accordance with the statute (§6743 Burns 1901, Acts 1899, p. 116, §1). p. 367.
4. **APPEAL AND ERROR.**—*Highways.*—*Enclosures.*—*Judgment.*—*Form of.*—*How Questioned.*—No error is presented on appeal by assigning error on the form of a judgment which establishes a highway but says nothing of enclosures existing, a motion to modify such judgment being the proper practice. p. 367.
5. **SAME.**—*Presentation of Cause.*—*Record.*—*Exceptions.*—*Legislative Powers.*—The manner of the presentation of a cause on appeal is for the determination of the appellate court, but the manner of making the record and saving exceptions is for the legislature. p. 368.
6. **SAME.**—*Instructions.*—*Record.*—*Statutes.*—To save questions on instructions under the act of 1903 (Acts 1903, p. 338), attorneys must comply substantially with the provisions thereof. p. 368.
7. **SAME.**—*Instructions.*—*Record.*—*Statutes.*—A filing with the clerk of the instructions in a cause twelve days after the verdict does not bring such instructions into the record by a bill of exceptions within the terms of the statute (§641i Burns 1905, Acts 1903, p. 338, §9). p. 370.
8. **SAME.**—*Admission of Evidence.*—*Appellate Court Rules.*—Where appellant's brief fails to set out the evidence admitted over objection, and fails to cite the record where it may be found, no question thereon is presented. p. 370.

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9. **APPEAL AND ERROR.—Evidence.—Recital of.—Briefs.**—Where appellant sets out in his brief simply the conclusions drawn from the evidence by counsel, no question is presented on the sufficiency of the evidence. p. 370.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Highway petition by George W. Gowland and others against which William P. Baker and others remonstrate. From an order of establishment, Baker appeals. *Affirmed.*

J. E. Wilson and *E. P. Honan*, for appellant.

Foltz & Spitler, for appellees.

BLACK, P. J.—The record of the board of commissioners of Jasper county filed on appeal in the court below shows, first, that a person named and described as “attorney for remonstrants” filed the petition of eleven persons representing that they had signed a certain petition asking that board to locate and establish a certain highway, described, in that county, and praying to withdraw their names therefrom, and that their names be struck therefrom as such petitioners. No action upon this application appears to have been taken by the board. The same person next entered special appearance (for whom is not stated) and moved “to dismiss petition,” not stating more definitely what petition, and not assigning any ground for the motion, “which is overruled by the board.” Thereupon the appellees, described as petitioners, presented to the board their petition for the location and establishment of a highway, which would pass over the lands of the appellant and of another person. This was signed by the same persons that signed the petition to withdraw their names, and by others, in such number that if the names of the persons who asked the withdrawal of their names were omitted, there would still be more petitioners than the number required by the statute. It does not appear that the court below made any ruling upon the matter of the withdrawal of names, or that it was asked to do so, and no exception to any action, or to

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omission of action, thereon appears in the record. The board appointed viewers, who at the next term presented their report, favorable to the establishment of the road, and thereupon the appellant appeared and filed his remonstrance, and the board appointed reviewers, and at the next term "the remonstrants" appeared by the attorney who had filed the petition for withdrawal of names, and presented the report of the reviewers, showing that they all found that the highway would be of public utility, and that two of them found that the appellant would be damaged in the sum of \$200, while one of them reported that the benefits accruing to the appellant would be equal to the damages which he would sustain. Upon the motion of the petitioners for the road, the board set aside this report and appointed other reviewers, and at the next term the attorney for the petitioners filed the report of these reviewers, showing that they found that the highway would be of public utility, and that the benefits would equal the damages sustained by the appellant. The appellant's motion to strike out this report was overruled by the board. This report having been approved and confirmed, the board ordered the establishment of the highway, and the appellant appealed to the court below, where the trial of the cause by jury resulted in favor of the petitioners for the highway and against the appellant, and judgment accordingly having been rendered, and the appellant's motion for a new trial having been overruled, this appeal was taken.

Plainly, the record does not present an opportunity for us to decide, as assigned here as error, that "the court erred in not permitting the withdrawals from the petition

1. filed in said cause of" the persons, some of the appellees, who filed the application for such withdrawals.

It is also assigned that the petition filed in this cause does not state facts sufficient to constitute a cause of

action, but in the appellant's brief the petition is

2. not set out, nor is the substance thereof stated, and no objection to it is suggested.

It is next assigned that the court erred in establishing a public highway on the route described in the petition and in the viewers' report, for the reason that the

3. viewers' report upon which the road was ordered established by the board of commissioners "sets out the following, in addition to other matters: 'We report that said route passes through enclosures of more than one year's standing on the lands of George Gowland and William P. Baker, and that a good way for the road can not otherwise be had without departing essentially from the route petitioned for; that said George Gowland freely consented to the establishment of said road, and said William P. Baker refused to consent thereto.'"
- If this assignment could be regarded as relating to any ruling of the court below excepted to, it is sufficient to say that it is therein indicated that the viewers proceeded in accordance with the statute. §6743 Burns 1901, Acts 1899, p. 116, §1.

It is next assigned that the court erred in establishing said proposed highway through the enclosure of William P.

Baker of more than one year's standing. It was

4. proper for the judgment of the court to follow in accordance with the verdict. The same may be said of the next assignment, that the court erred in entering judgment on the verdict of the jury returned in said cause. It has not been pointed out that any objection was made to the rendition of judgment in the form in which it was entered.

It is finally assigned that the court erred in overruling the appellant's motion for a new trial. We are urged to consider some of the court's instructions to the jury. Passing over suggestions of counsel for the appellees concerning the manner in which the objections to these instructions are presented in the appellant's brief, we will

consider the objection of counsel for the appellees to the consideration of the instructions because of the condition of the record.

While the manner of presentation of errors relating to instructions in briefs on appeal is regulated by the rules of this court, the manner of making instructions

5. parts of the record on appeal and the method of taking and saving exceptions to the action of the court upon instructions are not prescribed and can not be determined by this court. Such authority has not been given the court, but is exercised by the legislature.

On the day of the commencement of the trial the appellees filed a written request that the jury be instructed in writing and that the court give "the following

6. special instructions." This request, not containing any instructions, was signed by attorneys for the appellees; and nothing further relating to instructions appears in the proceedings of that day. The record of the proceedings of the next day is as follows: "Come the jury, and the argument of counsel is heard, and they retire in charge of a sworn officer to deliberate upon and consult of a verdict. Instructions as follows, to wit." Then follows one set of instructions, numbered one and two, not signed by any one, nothing further concerning them appearing. Immediately after the second of these instructions commences another set of instructions, numbered consecutively from one to twelve inclusive. After each one of these instructions is the following: "Given and excepted to at the time by the defendant, this 24th day of September, 1904," this being signed by attorneys for the defendant as such, and lower down and at the left, appears "C. W. Hanley, judge," each of these memoranda with these signatures being appended to the particular instruction to which it relates. Next is a request, signed by attorneys for the defendant, that "the following instructions" be given, and another request, signed in like manner, that all the

instructions be given in writing. There is nothing here relating to the filing of these papers. Immediately after them follow three instructions numbered consecutively, not signed by any one, and nothing being said by way of memorandum thereto annexed or otherwise relating to them or either of them. Immediately after them is an entry showing the return of the verdict. Twelve days afterward, at the same term, is an entry showing that the parties appeared by counsel, and the defendant "files instructions given in this cause with his exceptions, which instructions and exceptions read as follows." Thereupon follows the same set of twelve instructions, with the same signed memoranda following the instructions severally, as above stated, and immediately after them is the following, without signature: "And which are ordered filed and made part of the record, herein, and day is given."

Referring to the provisions of the statute of 1903 (Acts of 1903, p. 338), not including the provisions relating to oral instructions, which are not here applicable, it will be observed that there was failure in many respects to comply with the statutory requirements. No instructions requested, if any were requested, appear to have been signed by a party or his attorney. The court did not indicate by a memorandum signed by the judge at the close of any set of instructions requested, if any were requested, the numbers of those given and of those refused. No set of instructions given by the court of its own motion, if any so given, was signed by the judge. No instructions appear to have been filed with the clerk at the close of the instruction of the jury. No exceptions to the giving or refusing of instructions appear to have been taken orally and entered upon the records or minutes of the court, or in writing at the close of the instructions requested, if there were such, or those given by the court of its own motion, if there were such, by an entry by a party or attorney at the close of such instructions of a memorandum dated and signed and set-

ting forth in substance that such party excepted to the giving or the refusing of "each of the above instructions designated by its number."

The statute (§641i Burns 1905, Acts 1903, p. 338, §9) provides that no provision thereof shall be so construed as

to preclude any matter from being made a part of

7. the record by bill of exceptions under the rules of practice in force at the enactment of this statute, and counsel for the appellant refer to this provision; but it is quite plain that the filing mentioned above, twelve days after the verdict, did not save by bill of exceptions the set of instructions so filed. Besides, it did not appear that these were all the instructions given.

It is claimed that the court erred in the admission of evidence, but what the evidence was which was so

8. admitted is not shown, and the place where it may be found in the record is not indicated.

The statement of evidence in the appellant's brief does not sufficiently comply with the requirement of the rule that if the insufficiency of the evidence to sustain

9. the verdict or finding in fact or in law is assigned, the statement in the appellant's brief shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The evidence covers more than one hundred fifty typewritten pages of the record. The statement in the brief relating to the evidence covers about two printed pages, and consists of some numbered statements of conclusions of counsel as to what the evidence shows, and not of such a recital of evidence itself as the rule requires.

Judgment affirmed.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF INDIANA v. HALL.

[No. 5,404. Filed February 20, 1906.]

1. **INSURANCE.—Mutual Benefit.—Beneficiaries.—Interest.**—Prior to the death of a member of a mutual benefit insurance association, a beneficiary has only a contingent interest. p. 372.
2. **PLEADING. — Complaint. — Insurance.—Mutual Benefit.—Performance of Conditions.**—To authorize a recovery by the beneficiary of a certificate of a mutual benefit insurance association, it must be shown by the complaint that the assured performed the requirements of the constitution and by-laws, and an averment that the beneficiary performed all the conditions required by such beneficiary is insufficient. p. 372.
3. **TRIAL.—Insurance.—Mutual Benefit.—Payment for Assured.**—An allegation in a complaint, that assured, a member of a mutual benefit insurance association, performed all of the conditions on his part to be performed, is proved by evidence showing that such things were performed by others for him. p. 372.
4. **EVIDENCE.—Admissions.—Insurance.—Insured.—Beneficiary.**—As a general rule admissions of the assured, after receipt of the policy, are not admissible against the beneficiary, and this rule applies to mutual benefit as well as to ordinary insurance. p. 373.

From Warrick Circuit Court; *Elbert M. Swan*, Judge.

Action by Sue R. Hall against the Grand Lodge of the Ancient Order of United Workmen. From a judgment for plaintiff, defendant appeals. *Reversed.*

C. L. Wedding, for appellant.

Hatfields & Hemenway and *William M. Waldschmidt*, for appellee.

ROBY, C. J.—This is the second appeal. A judgment for appellee was heretofore reversed because of the insufficiency of the first paragraph of complaint. The objection urged was that it “failed to aver a compliance with all the conditions imposed upon the insured and the beneficiary by the contract.” It was then said by the court that there

must be "either a detailed allegation of performance of every condition or a general allegation of the performance of all conditions." *Grand Lodge, etc., v. Hall* (1903), 31 Ind. App. 107. When the cause was returned to the trial court, an amended complaint in two paragraphs was filed. The averment contained in the first paragraph thereof, relative to performance, being in terms as follows: "Immediately after the death of said William H. Hall, plaintiff furnished defendant with proof of death of said William H. Hall, and plaintiff has performed all of the conditions of said policy on her part to be performed."

Under the constitution and by-laws of the association it was incumbent upon the deceased member to keep up his membership. The beneficiary had only a contin-

1. gent interest prior to the death of the member.

Carter v. Carter (1905), 35 Ind. App. 73; *Bunyan v. Reed* (1904), 34 Ind. App. 295.

The appellant, in order to make a *prima facie* case, was required to plead performance by the assured. *Grand Lodge, etc., v. Hall, supra*; *Supreme Lodge, etc., v.*

2. *Knight* (1889), 117 Ind. 489, 491, 3 L. R. A. 409.

The allegation made is that the plaintiff has furnished proofs of death and performed all of the conditions "on her part to be performed." Prior to death of the member no condition on her part to be performed existed.

It is undoubtedly true that an allegation of performance by one upon whom a duty rests may be supported by proof of acts done by others for him. Had it been averred

3. that the insured performed the conditions upon his part to be performed, proof of payment of assessments by the appellant would therefore have been admissible, but no such averment is made, either in form or in substance. The demurrer to the first paragraph of amended complaint ought therefore to have been sustained.

In view of the necessity for a new trial, in which the same questions will arise, it is not inappropriate to say

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that, while logically there may be some distinction
4. between the admission of statements by the member of a benefit association as against his beneficiary in an action of this nature and statements of a similar character by the insured, under an ordinary life policy, the holding of the Supreme Court that the same rule obtains, made after due consideration, is binding upon this court. *Supreme Lodge, etc., v. Schmidt* (1884), 98 Ind. 374. Viewed in a broad way there is no reason why a distinction ought to be made. Conditions may exist under which they are receivable. *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32.

The judgment is reversed as of the date of submission, and the cause remanded, with instructions to sustain appellant's demurrer to the first paragraph of amended complaint and for further consistent proceedings.

EQUITABLE LIFE INSURANCE COMPANY OF IOWA v.
HEBERT ET AL.

[No. 5,560. Filed February 21, 1906.]

1. **INSURANCE.—Suicide.—Presumptions.—Burden of Proof.**—Suicide can not be presumed from death in an unknown manner where it is possible that such death might be due to negligence, accident or mistake, the burden of proving suicide being upon the insurance company alleging it as a defense. p. 374.
2. **SAME.—Suicide.—Evidence.**—Where the evidence showed that decedent was found dead with a bottle partly filled with carbolic acid in his vest pocket and a large bottle of same diluted with water near or under the body; that he had procured such acid for the purpose of a face wash to cure some pimples, the evidence of the presence of such acid in the mouth and stomach being in conflict; that he had previously suffered a sunstroke, and the day he died was excessively warm, the question of suicide was one of fact for the jury. p. 375.

From Allen Circuit Court; *E. O'Rourke*, Judge.

Action by Oliver Hebert and another against the Equitable Life Insurance Company of Iowa. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

P. B. Colerick, for appellant.

Breen & Morris, for appellees.

ROBINSON, J.—Appellees sued upon a policy of insurance issued upon the life of Oliver J. Hebert, on December 8, 1902. The assured was found dead July 28, 1903. The policy contained a provision “that should the assured within two years from date thereof take his own life, whether sane or insane, any policy issued thereon should become void, and all payments made thereon should be forfeited to said company.” The sufficiency of the evidence to sustain the verdict, the excluding of certain testimony offered, and the giving of a certain instruction are the only questions argued by appellant’s counsel.

Self-destruction can not be presumed from the mere fact of death in an unknown manner. The strong instinctive love of life and the uniform efforts of men to pre-

1. serve life will not permit a presumption of suicide where death may have resulted from accident or mistake. Appellees were entitled to recover unless appellant has by competent evidence overcome this presumption. If the facts are such that death might have resulted from accident, mistake or suicide, the presumption is against suicide. If the accused committed suicide, the law was against appellees, because the policy by its terms did not cover self-destruction, whether assured at the time was sane or insane. As the defense of suicide was relied upon, the burden of proving it was upon the appellant. See *Travelers Ins. Co. v. McConkey* (1888), 127 U. S. 661, 32 L. Ed. 308, 8 Sup. Ct. 1360; *Leman v. Manhattan Life Ins. Co.* (1894), 46 La. Ann. 1189, 15 South. 388, 49 Am. St. 348; *Walcott v. Metropolitan Life Ins. Co.* (1891), 64 Vt. 221, 24 Atl. 992, 33 Am. St. 923; *Supreme Council, etc., v. Brashears* (1899), 89 Md. 624, 43 Atl. 866, 73 Am.

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St. 244; *Meadows v. Pacific Mut. Life Ins. Co.* (1895), 129 Mo. 76, 31 S. W. 578, 50 Am. St. 427; *Streeter v. Western Union, etc., Soc.* (1887), 65 Mich. 199, 31 N. W. 779, 8 Am. St. 882; *Cronkhite v. Travelers Ins. Co.* (1889), 75 Wis. 116, 43 N. W. 731, 17 Am. St. 184; *Mallory v. Travelers Ins. Co.* (1871), 47 N. Y. 52, 7 Am. Rep. 410; *Hale v. Life Indemnity, etc., Co.* (1895), 61 Minn. 516, 63 N. W. 1108, 52 Am. St. 616.

The defense was that the assured took carbolic acid with suicidal intent. The deceased was found dead on the bank of a railroad right of way, lying on his back at full

2. length, his feet crossed at the ankles, one hand at his side and the other across his breast; in his vest pocket was a small vial containing carbolic acid, the contents of which were about half gone; and near or under the body was a large bottle containing a solution of carbolic acid and water. The appearance of the face did not indicate that there had been any severe pain preceding death. There was a post-mortem examination held; and the testimony of the physicians was directly contradictory as to the presence of carbolic acid in the stomach, as was also the evidence as to whether the mouth showed the use of carbolic acid. There is evidence that the assured had some pimples on his face, and that his mother had advised him to wash it with a solution of carbolic acid; that on the morning of his death he went to a drug store and purchased ten cents worth of carbolic acid, secured a large bottle and filled it with a mixture of the acid and water; that the day on which he died was an excessively warm day; that he had received a sunstroke a few weeks before he died, and that his physical condition was such that he might easily have succumbed to the excessive heat.

We have not undertaken to give the substance of all the testimony, but to show that while there are indications that point to suicide, there are other facts and circumstances not consistent with that theory. The evidence relied upon

to establish suicide was circumstantial, and in such case it should be sufficient to exclude, with reasonable certainty, any other cause of death. Although the evidence was contradictory as to the presence of carbolic acid in the stomach, and as to whether the mouth indicated the use of the acid, still if the evidence had shown, without dispute, that the acid was used and death resulted, the death might have resulted from accident or mistake, and this would be the presumption as against suicide. "When the dead body of the assured is found under such circumstances and with such injuries that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, a gross moral turpitude not to be presumed in a sane man; and whether it was from one or the other, if there is any evidence bearing upon the point, is for the jury; as, for instance, whether the taking of an overdose of laudanum was intentional or by mistake." May, Insurance (4th ed.), §325.

But, as stated, there was evidence that there was no indication of the presence of the acid in the stomach, nor did the mouth necessarily indicate that it had been used. The credibility of the witnesses was a question for the jury. It can not be said that there is no evidence to support the conclusion they reached. Whether the assured committed suicide was to be determined as any other question of fact. Upon a careful consideration of the evidence we do not find it such as authorizes us to disturb the verdict. See *Travelers Ins. Co. v. Nitterhouse* (1894), 11 Ind. App. 155; *Phillips v. Louisiana, etc., Life Ins. Co.* (1874), 26 La. Ann. 404, 21 Am. Rep. 549; *Hale v. Life Indemnity, etc., Co., supra*; *Leman v. Manhattan Life Ins. Co., supra*; *Michigan Mut. Life Ins. Co. v. Naugle* (1891), 130 Ind. 79; *Northwestern, etc., Ins. Co. v. Hazelett* (1886), 105 Ind. 212, 55 Am. Rep. 192; *Supreme Lodge, etc., v. Foster* (1901), 26 Ind. App. 333; *Cochran v. Mutual Life Ins.*

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Co. (1897), 79 Fed. 46; *Ingersoll v. Knights of Golden Rule* (1891), 47 Fed. 272; *Supreme Lodge, etc., v. Beck* (1899), 94 Fed. 751, 36 C. C. A. 467.

The correctness of the tenth instruction is questioned, but what we have already said concerning the presumption that the assured took his own life is applicable to the only question raised as to this instruction. We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

HELBERG v. DOVENMUEHLE.

[No. 5,720. Filed February 23, 1906.]

1. **APPEAL AND ERROR.**—*Vacation Appeal.*—*Parties.*—Appellant, in a vacation appeal, must make all coparties parties to the appeal and name them in the assignment of errors. p. 379.
2. **SAME.**—*Precipe.*—*Part of Record.*—*Presumptions.*—Where appellant in his precipe called for only that part of the record which affected one of several defendants, there is no presumption that such others were not properly before the court and affected by the proceedings. p. 380.

From Lake Circuit Court; *J. Frank Meeker*, Special Judge.

Suit by Henry C. Dovenmuehle against George H. Helberg and others. From a decree for plaintiff, defendant Helberg appeals. *Appeal dismissed.*

John O. Bowers, for appellant.

Harvey, Pickens, Cox & Kahn, Albert N. & E. P. Eastman and *Frank White*, for appellee.

BLACK, P. J.—The appellee has moved to dismiss the appeal. Suit was brought by the appellee alone against George H. Helberg, the appellant, and five other defendants, named in the title of the cause as “First National Bank of Hammond, Indiana, John Lienen, Peter Covert, Anna Covert, his wife, Fidelity Building & Savings Union No. 2, Marion county, Indiana.” The complaint contains

two paragraphs, the first being upon a promissory note made by the appellant, payable to the order of the appellee, and a mortgage upon real estate executed by the maker of the note to the payee, to secure the payment thereof. In this paragraph of complaint it was alleged that the appellee "is informed that the defendants First National Bank of Hammond, Fidelity Building Loan & Savings Association No. 2, Marion county, Indiana, John Lienen, Peter W. Covert and Anna Covert claim to have some interest • in or lien upon said mortgaged premises or some part thereof, which interests and liens, if any, are subsequent and subject to the lien of the plaintiff's said mortgage." In the first paragraph judgment was prayed for a certain sum, for the foreclosure of the mortgage and the sale of the real estate to satisfy the appellee's claim and costs, "and that all the defendants and all persons claiming under them subsequently to the commencement of this suit be barred and foreclosed of all right, claim and equity of redemption in said premises," etc., and for judgment over against the appellant, etc. The second paragraph of complaint need not be specially noticed, inasmuch as judgment was rendered against the appellee upon the first paragraph. "The defendant John Trinen" and "the defendants Peter W. Covert and Anna Covert, his wife," filed disclaimers. The appellant separately filed answers and the appellee replied thereto. Upon the trial the court found for the appellee upon his first paragraph of complaint, that there was due him from the appellant on the note and mortgage sued on therein a specified sum with costs, and that this mortgage "should be foreclosed against each and all of the defendants in this action," etc. The court adjudged that the appellee recover of the appellant under the first paragraph of complaint a certain sum and costs, and that the mortgage in the first paragraph set forth be "foreclosed against all the defendants in this action," • etc.

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This appeal was taken after the term, by notices from the appellant alone, served upon the clerk of the court below and upon the appellee. In the assignment of errors Henry C. Dovenmuehle is named as the appellee, and George H. Helberg is named as the appellant, by whom alone the alleged errors are assigned. No notice of the appeal appears to have been given by the appellant to his codefendants or to any of them.

A part of several coparties may appeal to the Supreme Court or to this Court, but if it be a vacation appeal, as is this case, the party or parties so appealing must

1. serve a written notice of the appeal upon all the other coparties or their attorneys of record, and file proof thereof with the clerk of the court to which the appeal is taken. Under certain circumstances, not appearing to be here involved, the notice may be given by publication. After such notice, unless the parties notified appear and decline to join in the appeal, they must be regarded as properly joined. If they decline to join, their names may be struck out on motion, and they can not take an appeal afterward. See §§647, 647a Burns 1901, Acts 1899, p. 5, Acts 1895, p. 179, §1. The appellant in the assignment of errors must name all who are affected by the judgment from which the appeal is taken. *Gourley v. Embree* (1894), 137 Ind. 82; Rule six of this Court; *Ewbank's Manual*, §126; *Brown v. Trexler* (1892), 132 Ind. 106; *Hutts v. Martin* (1895), 141 Ind. 701; *Garside v. Wolf* (1893), 135 Ind. 42. All the parties affected by the judgment must be before this court. It is claimed that there was no judgment against any party but the appellant. The judgment of foreclosure, however, was against all the defendants, and only one of them is before this court. Omitting those who filed disclaimers, there still remain other defendants who are affected by the judgment.

The statute of 1903 (Acts 1903, p. 340, §7, §641g Burns 1905) provides that any party or person desiring

a transcript of the record of any cause or proceeding or any part thereof, for appeal, may file with the clerk a written precipe therefor. "If such party or person desire a transcript of the entire record, it shall be sufficient to so state in the precipe; if a complete transcript be not desired, then such party or person shall indicate in the precipe the parts of the record desired. * * * Such precipe shall constitute a part of the record, and in obedience thereto the clerk shall include in the transcript every paper and entry in the cause thereby requested to be included, and every paper and entry by this act declared to be a part of the record shall be considered by the Supreme Court or the Appellate Court on appeal, when so included in the transcript, the same as though the matter had been made a part of the record by a bill of exceptions. The precipes shall be copied in the transcript immediately before the certificate of the clerk," etc.

In the precipe filed by the appellant in this case, it was not stated that he desired a transcript of the entire record. The cause was entitled as in the complaint, except that among the names of the defendants the name of "John Trinen" was inserted instead of the name "John Lienen," as in one of the disclaimers; and in the body of the precipe the appellant indicated particular parts of the record of which he directed the clerk to prepare and certify a transcript. The clerk's certificate conforms to the precipe, and the transcript is made to comply therewith. The precipe contains no reference to any summons or to an entry of any default, or to any answer except as above stated, and the transcript does not show whether any summons was issued or served, or whether any default was taken and entered, or whether there was any other answer or answers than those above mentioned. The portions of the record specified in the precipe, and contained in the transcript in compliance therewith, are before us, but we

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can not assume that there was no summons duly served, or that there was no default, or that there was no answer on the part of any defendant except as shown in the transcript made under and in compliance with a precept calling for only certain other particular parts of the record.

It can not be said with confidence that no defendant against whom the judgment was rendered, except the appellant, is affected thereby. There can be but one appeal from the judgment, and the party taking it must bring before this court all the parties to the judgment, whose interests would be affected by the decision upon appeal.

The appeal is dismissed.

CAMERON v. THE STATE.

[No. 6,050. Filed February 23, 1906.]

1. **APPEAL AND ERROR.—***Bill of Exceptions.—Entry of Filing.*—Where a record entry, after mentioning a bill of exceptions, states: "Which bill of exceptions is now tendered to the court and by the court signed and filed with the clerk of this court, said bill of exceptions being in these words," the filing of the bill is sufficiently shown. p. 382.
2. **CRIMINAL LAW.—***Witnesses.—Rights of State.*—The State may subpoena witnesses and compel their attendance whether their names are indorsed on the back of the indictment or not. p. 383.
3. **SAME.—***Conviction.—Acquittal.—Costs.*—On acquittal of a defendant in a criminal case no costs are taxable, but on conviction, all proper costs are taxable against defendant unless the court or jury shall relieve him from such payment. p. 383.
4. **SAME.—***Conviction.—Costs.*—Defendant in a criminal case, on conviction, is not taxable with costs of State's witnesses not indorsed on the indictment, and who were not sworn, or who, if sworn, failed to testify to any material fact. p. 384.
5. **SAME.—***Plea of Guilty.—Costs.*—Defendant, on a plea of guilty, is taxable with costs of all witnesses, whether indorsed on the indictment or not, unless he shows that unnecessary witnesses were subpoenaed by the State, the presumption being that the prosecuting attorney acted in good faith and subpoenaed only those he thought necessary. p. 385.

From Steuben Circuit Court; *Charles E. Emanuel*, Special Judge.

Prosecution by the State of Indiana against Robert Cameron. From a judgment of conviction, defendant appeals. *Affirmed.*

Brown & Carlin and *Woodhull & Yeagley*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild*, *W. C. Geake* and *Best & Yotter*, for the State.

ROBINSON, J.—Appellant was indicted for selling liquor without a license. On February 23, 1905, he was arraigned and entered a plea of not guilty, and the case was then set for trial on March 1, 1905. On that date he entered a plea of guilty and was fined \$30 and adjudged to pay the costs. Afterward appellant filed a motion to retax certain witness fees as costs, on the ground that the names of none of such witnesses were indorsed on the indictment, that they were not sworn, that none of them swore to any material fact in aid of the prosecution, and that all of such fees were taxed for mileage and attendance of such witnesses on the trial of the case.

It is first claimed that the record does not show the filing of the bill of exceptions in the clerk's office. A record entry, after reciting the overruling of the motion

1. to retax costs and an exception by appellant, and making mention of the bill of exceptions, states, "which bill of exceptions is now tendered to the court and by the court signed and filed with the clerk of this court, said bill of exceptions being in these words;" this is followed by a transcript of the bill of exceptions. This recital of the filing of the bill is not in the bill itself, but is a record entry, and sufficiently shows that the bill was filed with the clerk.

Section 1740 Burns 1901, §1671 R. S. 1881, requires the names of all material witnesses to be indorsed upon the

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indictment, but other witnesses may afterward be

2. subpoenaed by the State; but, unless the names of such witnesses be indorsed on the indictment at the time it is presented, no continuance shall be granted to the State on account of the absence of any witness whose name is not thus indorsed. This section permits the use by the State of witnesses whose names are not on the indictment, and simply prevents the State from having a continuance because of the absence of a witness whose name is not on the indictment. §1851 Burns 1901, §1782 R. S. 1881. See *Short v. State* (1878), 63 Ind. 376; *Siberry v. State* (1893), 133 Ind. 677.

Section 8103 Burns 1901, §6027 R. S. 1881 provides: "In all criminal cases where the person accused shall be acquitted, no costs shall be taxed against such per-

3. son, nor against the State or county, for any services rendered in such prosecutions by any prosecuting attorney, clerk, sheriff, coroner, justice of the peace, constable or witness; but in all cases of conviction, such fees and costs shall be taxed and collected from the person convicted." This provision is modified by the subsequent enactment of §1907 Burns 1901, §1838 R. S. 1881, which provides: "When the defendant is found guilty, the court shall render judgment accordingly; and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise." Under this section the court may relieve a defendant from the payment of all costs, but it is not a matter of mere arbitrary discretion. "What particular facts," said the court in *Welsh v. State* (1890), 126 Ind. 71, 9 L. R. A. 664, "would authorize a court or jury, finding a defendant guilty, to relieve him from the payment of costs, we need not now inquire, but he should not be so relieved without some reason for so doing" See *State v. Sevier* (1889), 117 Ind. 338.

Section 1927 Burns 1901, §1858 R. S. 1881, provides: "In case of the conviction of a defendant, no cost for mileage or attendance shall be taxed against such defendant in behalf of any witness who was summoned by the State to testify, but whose name was not indorsed upon the indictment nor upon the information, and who was not sworn in the cause, or who, if sworn, did not testify to any material fact in aid of the prosecution." It is also provided (§1866 Burns 1901, §1797 R. S. 1881) that witnesses in a criminal prosecution, if subpoenaed, may be compelled to attend and testify without their fees being first paid or tendered, and that the court may recognize witnesses to attend and testify.

Prior to the enactment of §1927, *supra*, the fees of all witnesses subpoenaed by the State, whether used or not, or whether they testified to anything material or not, were taxed as costs against the defendant upon conviction. 1 R. S. 1876, p. 479; *Schlicht v. State* (1877), 56 Ind. 173. And it would seem that the purpose of §1927, *supra*, was to relieve defendants from the payment of certain witness fees where there is a trial upon a plea of not guilty, as relief is given from costs of witnesses who are not sworn, or who, if sworn, do not testify to some material fact in aid of the prosecution. Unless there was a trial it could not be determined whether a witness had been subpoenaed by the State to testify to any material fact in aid of the prosecution. An issue of fact might arise during the progress of the trial that would require additional witnesses, or issues of fact contemplated when the witnesses were subpoenaed might not arise during the trial. Only in a contested case could it be determined whether the testimony of witnesses subpoenaed would be material or not.

In the absence of any showing to the contrary it must be presumed that the prosecuting attorney acted in good

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faith, and that no more witnesses were subpoenaed

5. than were necessary to sustain the State's case, and that only such witnesses were subpoenaed as would testify to material facts in aid of the prosecution. When appellant was arraigned and entered a plea of not guilty, and the case was set for trial, it was the duty of the prosecuting attorney to prepare for the trial. The plea of not guilty stood until after these witnesses were subpoenaed, and until the time they were required by the subpoenas to be in court. The plea was then changed, and the testimony of the witnesses was not needed. Had the plea of guilty been entered at the time of the arraignment, no witnesses would have been necessary. But appellant chose to stand upon his plea of not guilty until the State was required to prepare for trial and had the witnesses in court ready for trial. There is nothing to overcome the presumption that the preparation that was made for the trial was necessary and proper. The names of the witnesses here in question were not indorsed on the indictment, and if there had been a trial and they had not been sworn and testified to some material fact in aid of the prosecution, upon conviction their fees could not have been taxed as costs against appellant. But there is nothing in the record to rebut the presumption that the prosecuting attorney acted in good faith in having them subpoenaed, and that each was a competent and necessary witness. They were present in court and did not testify because of the act of appellant alone. In civil actions, if the attendance of witnesses is procured in good faith by one of the parties, he will not lose his right to recover the costs of such witnesses by the subsequent conduct of the other party in rendering their attendance unnecessary. *Ohio, etc., R. Co. v. Trapp* (1892), 4 Ind. App. 69; *Alexander v. Harrison* (1891), 2 Ind. App. 47; *Miller v. DeArmond* (1884), 93 Ind. 74; *Teeple v. Dickey* (1884), 94 Ind. 124. And see *Deweese v. Smiley* (1891), 1 Ind. App. 81.

While a rule in civil actions is not necessarily controlling in criminal actions, yet we fail to see any sufficient reason, upon the facts disclosed, for applying a different rule in this case from that applied in a civil action. It is quite true that a defendant should be granted relief where bad faith is shown, or where it is made to appear that witnesses were unnecessarily subpcnaed, but such a case is not presented by this record.

Judgment affirmed.

AMERICAN QUARRIES COMPANY v. LAY.

[No. 5,009. Filed February 21, 1905. Rehearing denied June 27, 1905. Transfer denied February 23, 1906.]

1. **CONTRACTS.—Oral.—Not to be Performed within the year.—Frauds, Statute of.**—An oral contract by a company to pay an injured employe certain wages during disability, to pay his nurse hire, doctors' bills, and to give him employment when recovered, in consideration of a release of his claim for damages, is not within the statute of frauds, since such contract, being personal, may terminate by the death of such employe within the year. p. 389.
2. **SAME.—Signed by one Party.—Acted upon by Other.**—A writing, signed by an injured employe, releasing a company from liability for damages in consideration of the payment of certain sums and future employment, which writing is not signed but is acted upon by such company, is binding upon both. p. 390.
3. **NEW TRIAL.—Contract Actions.—Excessive Damages.**—That the damages are excessive, is not a ground for a new trial in actions founded upon contract. p. 391.
4. **SAME.—Contract Actions.—Recovery too Large.**—That the amount of recovery is too large, is a good ground for a new trial in actions founded on contract. p. 391.
5. **PRINCIPAL AND AGENT.—Corporations.—Superintendents.—Release.—Contracts.**—The general agent of a corporation, having power to employ and discharge men, has the power on behalf of such corporation to enter into a contract with an injured employe for the release of such employe's claim for damages. p. 391.

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6. **CONTRACTS.—Release of Claim for Damages.—Ratification.**—Where a company's general agent entered into a contract with an injured employe for the release of his claim for damages, and such company took and retained such contract and made several payments thereunder, ratification thereof is established. p. 392.
7. **SAME.—"During Disability."—Question for Jury.**—Where plaintiff by a contract released his claim for damages partly in consideration of certain payments "during disability," the time covered by such disability was a question for the jury. p. 392.
8. **TRIAL.—Interrogatories to Jury.—Nature of.**—An interrogatory to the jury asking upon what paragraph of complaint damages are awarded is improper. p. 393.
9. **APPEAL AND ERROR.—Death.—Judgment.**—Where appellee dies during the pendency of the appeal, a judgment of affirmance will be made as of date of submission. p. 393.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by James Lay against the American Quarries Company. From a judgment for plaintiff, defendant appeals. (Transfer denied, see 166 Ind. 234.) *Affirmed*.

E. C. Field, H. R. Kurrie and John H. Underwood, for appellant.

John H. Edwards and Henry P. Pearson, for appellee.

ROBY, J.—Appellee's amended complaint was in three paragraphs, to each of which appellant's demurrer for want of facts was overruled. The issue was closed by a general denial, trial by jury had, a verdict returned for \$4,500, appellant's motion for a new trial overruled, and judgment rendered on the verdict, from which this appeal was taken.

The errors assigned question the action of the court in overruling the demurrers and in overruling the motion for a new trial.

The first and second paragraphs of the amended complaint are founded upon a written instrument which is filed as an exhibit, and which is in terms as follows:

"In consideration of the sum of regular wages during disability, at \$1.25 per each working day, neces-

sary nurse hire, and all doctor bills resulting from present disability, and employment when recovered, to me in hand paid by the American Quarries Company at their regular pay-days, I do hereby release and forever discharge said American Quarries Company from any and all actions, causes of actions, claims and demand for, upon or by reason of any damages, loss or injury, which heretofore have been or which hereafter may be sustained by me in consequence of the accident occurring to me on March 12, 1902, by which my right leg was broken below the knee. It being further agreed and understood that the payment of said sums are not to be construed as an admission on the part of said American Quarries Company of any liability whatever in consequence of said accident. In witness whereof, I have hereunto set my hand and seal the 15th day of March, 1902.

Signed and sealed

James Lay.

in the presence of:

William C. Fultz.

F. F. Storer.

“State of Indiana, Lawrence county: ss. Before me, John R. Andrews, a notary public in and for said county and State, this 15th day of March, 1902, personally appeared James Lay who acknowledged the execution of the annexed release.

Witness my hand and notarial seal.

John R. Andrews, notary public.

[Notarial Seal.]

Com. expires Dec. 8, 1902.”

It is alleged in connection therewith that appellant was a corporation engaged in operating a stone-quarry in Lawrence county; that appellee on March 12, 1902, while in its employ as a laborer at \$1.25 per day, was injured by the explosion of a blast; that on the 15th day of said month he entered into said contract by which he released appellant from all claims and demands arising out of his said injury, and that he has performed all the conditions of said contract on his part; that it was signed on behalf of appellant by its superintendent in charge of its business in said county, executed and acknowledged before a notary

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public, received, accepted and ratified by appellant, who now has possession of the same, and has, pursuant to its terms, paid the nurse hire and doctor's bill, and \$1.25 per working day, above mentioned, to appellee up to May 5, 1902; that it failed and refused further to comply with the terms of said contract upon its part; that from May 5 to May 22 there was due and payable to him the sum of \$16.50, of which sum appellant paid \$8.75, leaving due the sum of \$7.75, which he demanded at its office on said day, the same being its regular pay-day; that it has repudiated said contract, and notified appellee that it will not be in any manner bound thereby; that since said injury appellee has been wholly unable, on account of his physical condition due thereto, to perform any labor or earn any money, and has not recovered from the effects of said injury, but is wholly disabled and unable to perform any labor, is permanently crippled and injured for life, and is an object of charity, and that he will be wholly unable to earn a livelihood during the remainder of his life. Wherefore, etc.

The third paragraph of the pleading differs from the others only in this, that the contract is not averred to have been in writing. The objection urged to it, which

1. does not apply to the others, is that the contract therein set up is within the statute of frauds. §6629 Burns 1901, cl. 5, §4904 R. S. 1881. If the premise, that the contract was not to be performed within a year from the making thereof were granted, the conclusion would follow, but the contract was personal in character and might have terminated within a year through the death of appellee, and was not therefore within the statute. *Pennsylvania Co. v. Dolan* (1893), 6 Ind. App. 109, 118, 51 Am. St. 289; *Hinkle v. Fisher* (1885), 104 Ind. 84; *Durham v. Hiatt* (1891), 127 Ind. 514.

The writing heretofore set out, upon which the first and second paragraphs of complaint depend, does not contain

an express promise in terms on appellant's part to

2. pay appellee \$1.25 per each working day, necessary nurse hire, and all doctor bills resulting from present disability, and to give him employment when recovered, but it does contain a release on his part of any right against appellant, growing out of the injury suffered by him while in its service, such release being made in consideration of those things. It was not signed by appellant, but it was signed by appellee, and, as alleged, acted upon by appellant. It therefore became obligatory upon both. *Alcorn v. Morgan* (1881), 77 Ind. 184, 186; *Munson v. Ray* (1845), 7 Blackf. 403; *Stewart v. Chicago, etc., R. Co.* (1895), 141 Ind. 55; *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 54 L. R. A. 787. The acceptance of the release implied an accession to its terms, thereby creating a contract as binding as one signed by both parties. *Adams Express Co. v. Carnahan* (1902), 29 Ind. App. 606, 94 Am. St. 279; *Street v. Chapman* (1867), 29 Ind. 142; *Chicago, etc., R. Co. v. Derkes* (1885), 103 Ind. 520; *Leach v. Rains* (1897), 149 Ind. 152, 157.

In *Pennsylvania Co. v. Dolan, supra*, a release from liability for personal injuries had been obtained from the appellee upon the consideration of \$100 and steady and permanent employment. It was contended that the agreement lacked mutuality. In the course of the opinion, written by Judge Reinhard, it was said: "Suppose that, instead of the release executed by the appellee, he had paid the appellant \$500 in cash, in consideration of which the latter had agreed to employ the former as a flagman in its yards, during his life, at the rate of \$2 per day. Could it be held that the want of mutuality would entitle the appellant to keep the \$500, and after a few months of employment and without any fault on his part, discharge him? We think not. * * * The appellee has relinquished a claim against the appellant that had a certain value. It has

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placed it beyond his power to recover upon that claim, and the appellant has received a corresponding benefit. The appellant, recognizing his obligation in the premises, gives the appellee, employment for a short time, and then, without the latter's fault, and without any just cause, and in violation of the terms of its agreement, discharges him and leaves him in his crippled condition to buffet with the world as best he can. This is, in our estimation, a flagrant breach of the contract, and courts exist to a poor purpose if they can give no redress for such a wrong." Nothing could be written more directly applicable to the facts involved in the case at bar. There was no error in overruling the demurrers.

The grounds stated for a new trial are: (1) "That the damages assessed by the jury are excessive." The action is on contract. This ground applies to

3. actions in tort only. §568 Burns 1901, cl. 4, §559 R. S. 1881; *Norris v. Churchill* (1898), 20 Ind. App. 668; *Milwaukee, etc., Ins. Co. v. Stewart* (1895), 13 Ind. App. 640.

In an action upon contract the statutory cause for a new trial is that the amount of recovery is too large. §568, *supra*; *Louisville, etc., R. Co. v. Renicker* (1897),

4. 17 Ind. App. 619; *Fenner v. Simon* (1901), 26 Ind. App. 628. The point is made by appellee's counsel in their brief, and is well taken.

(2) "That the verdict of the jury was not sustained by sufficient evidence." The insufficiency asserted relates to the authority of the agent to make a contract for

5. appellant, and to its acceptance and ratification thereof. The representative of the master who procured the execution of the release for appellant's benefit, taking care that it was witnessed and acknowledged before a notary public, had power to employ and discharge men, was in charge of appellant's quarry, and entered into the contract as superintendent of the American Quarries

Company. The evidence shows him to have been a general agent, with power coextensive with the business. He therefore had power to bind his principal in his transactions incident thereto. *Minor v. Mechanics Bank* (1828), 1 Pet. 46, 7 L. Ed. 46; *Glidewell v. Daggy* (1863), 21 Ind. 95; *Goshorn v. People's Nat. Bank* (1904), 32 Ind. App. 428.

It is further shown by the evidence that the contract was, upon its execution, immediately forwarded by the superintendent to appellant's home office, and had been

6. retained by it up to the time of the trial; that \$78 or \$79 had been paid by appellant to appellee under the contract, such payment being made by checks executed by the Bedford Stone Railway, a corporation operated by the American Quarries Company, under the superintendence of the agent above referred to; and that appellee's doctor and nurse bills had also been paid by it. Circumstances clearly justify the finding of the general verdict upon the ground of ratification, as well as of the original authority of the agent. *Willison v. McKain* (1895), 12 Ind. App. 78; *Fouch v. Wilson* (1877), 59 Ind. 93.

Neither can it be said that the phrase "during disability" applies only to the time that a nurse and doctor were required. The continuance of the disability

7. was a matter of proof. Both bones of appellee's leg were broken below the knee, and the limb is shortened five inches. He was at the time of the trial fifty-two years old, and an inmate of the poorhouse. It was inferable that the injuries referred to were responsible for his condition. At any rate, if the disability had ceased he was entitled to employment under the contract. The consideration agreed to be given for the release was a matter of free choice. The language used by this court in enforcing a release of liability by a servant for a nominal consideration is in point: "After the injury was incurred the appellant was at full liberty to compromise the damages

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with the appellee for any valuable consideration, however small; and if he chose to accept a less amount than that to which he might have been entitled in an action therefor, in the proper court, such settlement is nevertheless a full accord and satisfaction from which the courts can not relieve him." *Lease v. Pennsylvania Co.* (1894), 10 Ind. App. 47, 51. The converse of the proposition is true. If appellant made a contract favorable to appellee, it did so at its own option.

(3) "The court erred in refusing to submit interrogatory six to the jury." The interrogatory tendered was as follows: "Do you give plaintiff damages on ac-

8. count of the written contract set out in the first and second paragraphs of the complaint, or did you give him damages on the oral contract set forth in the third paragraph?" The interrogatory did not call for any fact provable within the issue. It was therefore correctly refused. *Salem-Bedford Stone Co. v. Hilt* (1901), 26 Ind. App. 543.

We do not find any error in the record.

The death of the appellee having been suggested,

9. the judgment is affirmed as of the date of submission.

YAHEY v. LEICH ET AL.

[No. 5,635. Filed February 23, 1906.]

1. **APPEAL AND ERROR.—Jurisdiction.—Amount Involved in Appeal.**—An action for the recovery of \$29.38, filed May 5, 1903, in which judgment for such amount was rendered March 9, 1904, can not be appealed to the Supreme or Appellate Court, since the act of 1903 (Acts 1903, p. 280, §1337f Burns 1905) limits such appeals, with certain exceptions, to judgments exceeding \$50. p. 394.
2. **SAME.—Jurisdiction.—Raising Question.**—The Appellate Court will take notice of its lack of jurisdiction, and dismiss an appeal where its jurisdiction is wanting. p. 394.

From Greene Circuit Court; *Orion B. Harris*, Judge. Action by Charles Leich and others against Joseph W. Yakey. From a judgment for plaintiffs, defendant appeals. *Appeal dismissed.*

Slinkard & Slinkard, for appellant.

W. L. Cavins and *Charles E. Henderson*, for appellees.

COMSTOCK, J.—Appellees were plaintiffs below, and as partners sued Joseph W. Yakey, appellant, as clerk of the Greene Circuit Court, to recover the sum of \$29.38,

1. alleged to have been paid to said clerk for their use and benefit, and which he refused to pay to them upon their demand. The cause was put at issue by general denial, and the trial by court resulted in a judgment in favor of appellees for \$29.38. The complaint was filed May 5, 1903, and judgment rendered March 9, 1904. At the commencement of the action and at the date of the rendition of the judgment, §1337f Burns 1905, Acts 1903, p. 280, §1, in force March 9, 1903, defined the jurisdiction of appeals in civil cases in the following language: "No appeal shall hereafter be taken to the Supreme Court or Appellate Court in any civil case where the amount in the controversy, exclusive of interest and costs, does not exceed \$50, except as provided in section eight of this act."

There is not in this case any question mentioned

2. in section eight. This court must take notice of its want of jurisdiction. *Everett Piano Co. v. Bash* (1903), 31 Ind. App. 498, and cases cited.

The lack of jurisdiction appears, and the appeal is therefore dismissed.

WARNER v. JENNINGS.

[No. 5,652. Filed February 23, 1906.]

1. PLEADING.—*Complaint.—Exhibits.—Declaring Deed a Mortgage.—Cancellation of Instruments.—Suretyship and Guaranty.—Husband and Wife.*—A paragraph of complaint alleging that a certain deed was in reality a mortgage, and praying

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that it be declared such, and that it be canceled because the plaintiff, a married woman, executed same as surety, is sufficient; and it is not necessary to file such deed as an exhibit to such complaint. p. 397.

2. PLEADING.—*Complaint.*—*Demurrer.*—*Special Findings.*—Where a demurrer is erroneously sustained to a paragraph of complaint, the fact that the judgment logically follows the special findings on the other paragraphs thereof does not render such error harmless. p. 397.

From Scott Circuit Court; *Willard New*, Judge.

Suit by Alice Warner against William L. Jennings. From a decree for defendant, plaintiff appeals. *Reversed.*

L. A. Douglass and *A. N. Munden*, for appellant.

Joseph H. Shea and *Mark Storen*, for appellee.

COMSTOCK, J.—The complaint of appellant, a married woman, who was plaintiff below, was in three paragraphs. The first alleges that appellant made a deed for 140 acres of land to the appellee, and that by mutual agreement appellee was to hold the land until the rents and profits therefrom should pay him a debt of \$500 and interest, due from appellant to him; that he kept the land, used the rents and profits, and paid himself the debt, but refused to reconvey the land. The second alleges that appellant was indebted to John Hamilton in said sum of \$500, and appellee was her surety; that she deeded the land to appellee to indemnify him as such surety from any loss or damage, and he was to apply the rents and profits to repay himself the money, unless the land should be sold, in which event he was to share in and have his pay out of the sale money; that he took possession of the rents and profits, and that defendant paid himself in full, but that he refused to reconvey to appellant. In each of the above paragraphs, briefly stated, the court is asked to declare a deed a mortgage, have the same declared satisfied and the land reconveyed. A demurrer to each was overruled.

The third amended paragraph of the complaint in substance states that appellant was a married woman; that her

husband owed a debt of \$500 on a note, upon which appellee and Susanna Jennings, the mother of appellant, were sureties, and that to indemnify them she mortgaged the land to them; that afterwards, further to indemnify appellee from loss, she made a deed to him for the land; that said deed was in fact a mortgage, and it was void by reason of appellant's being a married woman. Prayer that the deed be canceled, etc. A demurrer to this paragraph was sustained. Appellee answered in five paragraphs, the first and second being general denials to the first and second paragraphs of the complaint, the third and fourth, the statute of limitation, the fifth, that he purchased the real estate described in the complaint and paid full value thereof, to wit, the sum of \$800, and received a warranty deed from the plaintiff and her husband on the 20th day of January, 1890, and immediately went into possession of said land, which possession he has held since said time, expending large sums of money in clearing said land and preparing it for farming purposes, has paid the taxes each year, and in paying interest on the original price of said land has paid more than he has received in rents and profits, etc. Appellee also filed a cross-complaint, alleging that he purchased the real estate described in the complaint, paid the full value thereof, and received a warranty deed from the plaintiff and her husband on the 20th day of January, 1890, and immediately went into possession thereof, which possession he has held, expending large sums of money in clearing said land and preparing it for farming purposes; that he has each year paid taxes, and in this way and in paying interest on the original price of said land has expended more than he has received from the rents and profits therefrom; that the claim asserted by the plaintiff is a cloud upon his title; and that if, upon a hearing of the cause, it should be determined by the court that said conveyance was made for the purpose of securing and indemnifying this cross-complainant for said amount

of money above set out, then this cross-complainant prays the court that said \$800, with the interest thereon from the 20th day of January, 1890, at 8 per cent per annum, together with the amount expended for taxes, be declared a lien thereon, etc. The cause was put at issue upon the first and second paragraphs of the complaint, the answers and reply thereto and the cross-complaint and answer to the same. Upon proper request the court made special findings, stated conclusions of law, and rendered judgment thereon in favor of appellee, that he is the owner in fee simple of the real estate described in the complaint, and quieting his title thereto. Said findings and conclusions were filed in the Scott Circuit Court in vacation. The action of the court in sustaining the demurrer to the amended third paragraph of the complaint, in announcing the special findings and conclusions of law in vacation, in filing the special findings and conclusions in vacation, and that said special findings and conclusions were never filed in court, are each specified as error.

It is contended by appellee that said third paragraph of the complaint is fatally defective, because the deed which it seeks to have declared a mortgage is the founda-

1. tion of the action and that no exhibit purporting to be a copy thereof is filed therewith. This position we think is not tenable. The gist and foundation of the paragraph is that appellant, a resident married woman, signed such deed as surety. The issue of suretyship is not tendered by any other paragraph. It is further contended that even if it were error to sustain the demurrer,

2. such error was harmless, because the same questions are presented by exceptions to the conclusions of law upon the special findings. The rule contended for does not apply in the case at bar, because the court held by its ruling on the demurrer that the facts set out, if proved, would not constitute a cause of action. *Replogle v. American Ins. Co.* (1892), 132 Ind. 360. The paragraph stated

a cause of action. Where a party duly excepts to the ruling on a demurrer which overthrows a valid pleading, he does not waive any rights by suffering the case to proceed to trial; nor is he bound to offer evidence on the subject covered by his pleading, for his exception to the ruling on the demurrer effectually asserts and preserves his rights. No attempt is made to make the evidence a part of the record. The other specifications of error need not be considered.

Judgment reversed, with instructions to overrule appellant's demurrer to the third paragraph of the complaint.

HEIGERT v. THE STATE.

[No. 5,687. Filed October 26, 1905. Rehearing denied February 23, 1906.]

1. **CRIMINAL LAW.—Baseball.—Sunday.—Fee.**—Where the management of a Sunday game of baseball charged fifteen cents for seats in the grandstand and ten cents for "bleachers," there is a violation of law, the claim that the fee was paid for the "seats" and not for the game being a subterfuge or an attempt to evade the statute. p. 401.
2. **SAME.—Baseball.—Sunday.—Fee.**—Where a Sunday baseball game was not free and an admission was charged to some of the spectators, the law is violated, though some may witness such game without the payment of any fee. p. 401.

From Hancock Circuit Court; *Edward W. Felt*, Judge.

Prosecution by the State of Indiana against James Heigert. From a judgment of conviction, defendant appeals. *Affirmed.*

Binford & Walker, for appellant.

Charles W. Miller, Attorney-General, *W. C. Geake*, *A. C. Van Duyn* and *C. L. Tyndall*, for the State.

ROBY, J.—Appellant was charged by indictment and found guilty upon trial of having unlawfully engaged in playing a game of baseball, where an admission fee was

charged and paid by the spectators, upon Sunday. §2087 Burns 1901, Acts 1885, p. 127; *State v. Hogleiver* (1899), 152 Ind. 652.

The evidence was to the effect that on September 11, 1904, said day being the first day of the week, commonly called Sunday, the defendant, James Heigert, engaged in playing a game of baseball on the ball ground located at or near a park called Spring Lake Park, in Hancock county, State of Indiana. Said ground had been leased by Mrs. Jennie Colestock to a Mr. Matthews. Said ground was bounded on the north by the Spring Lake Park land, which was owned by Mr. Matthews. Said ground was bounded on the east, west and south by the lands of said Jennie Colestock. Said ground where said game was played had been scraped or leveled, and a baseball diamond made thereon, and at the northwest corner of the ground so prepared an amphitheater stood fronting eastward on the ball ground. Said amphitheater was provided with seats, and there was a roof over said seats to protect the occupants thereof from the sun and rain. Said amphitheater was entered from the north end thereof by means of steps. A short distance east of said amphitheater, and on the north side of said ground, seats had been constructed of boards without any covering over them, said seats being characterized as "bleachers." Said seats fronted southward on the ball ground. A tight board fence extended east from the north end of said amphitheater, along the north side of said ground, to a point within forty feet of the east line of said ground. Said fence thence veered in a southeastwardly direction a very short distance, stopping before it reached the east line of said ground. Said fence was of such height that people on the north side thereof could not see the players in the game of ball on the south side thereof. There was a gate in said fence a little east of the amphitheater, and near said board seats or "bleachers." At the east end

of said fence people, by passing over other lands, could pass around and onto the ball ground, and view the ball ground and the game of ball while it was being played, there being no fence on the east side of said ground. There was no fence on the south side of said ground, and the view from the west end of said ground was unobstructed, except the part along which the amphitheater fronted. A building used as a ticket office stood a little to the north of the amphitheater, and while said game of ball was being played tickets were sold at fifteen cents each, entitling the purchasers to occupy seats in the amphitheater, and tickets were also sold at ten cents each, entitling the purchasers to occupy seats on the "bleachers" east of the amphitheater. About four hundred seventy-nine tickets were sold for the amphitheater seats and about one hundred twenty tickets for the "bleacher" seats. The tickets sold for seats in the amphitheater were taken up at the entrance thereof as the purchasers passed in, and the tickets for the "bleachers" were taken up as the purchasers passed through the gate leading to said seats. Said seats so sold were occupied by the purchasers while the game of ball was being played. During the entire time said game was being played the view on the east and south sides of said ground was unobstructed, and the view was unobstructed on the west side of said ground, except the points along which the amphitheater extended, and persons desiring to see said game could do so at said points without paying any fee therefor. No attempt was made by the defendant or any person connected with the game to prohibit persons from seeing said game at said points, and no tickets were sold nor fee charged except the tickets sold for the seats in the amphitheater and for the seats on the "bleachers." A great many people did witness said game of baseball from the east and south sides of said ground, and from points on the west side of said ground, said persons did not pay

any fee for seeing said game, and no attempt was made by the defendant or any one connected with said game of ball to prevent them from seeing said game of ball.

Appellant's propositions for reversal, raised by exceptions to instructions given and to the refusal to give instructions requested by him, are that the question of an

1. admission fee's being charged should not have been submitted to the jury. It is claimed that evidence showing the sale of seats is not supportive of the charge made, and that the offense does not exist if the game can be seen by spectators without being compelled to pay for so doing.

The eleventh instruction given was as follows: "In determining whether the fee paid, if any, was such as makes the defendant liable, you must determine from the evidence whether the fee so paid was paid that the spectator might see the game of baseball, or simply for the purpose of having a seat, without any relation whatever to the game of baseball which was played, if any was so played. If the playing of the game of baseball was the inducement which led to the payment of a fee by spectators, if any did so pay, then any one engaged in playing a game of baseball on Sunday, as alleged in the indictment, is guilty under the statute." The law concerns itself with substance rather than form. It does not tolerate subterfuge or evasions, and the evidence justified the court in submitting the question of fact to the jury, as was done.

The thirteenth instruction was as follows: "The fact that some may have seen the game in question without paying any fee, or that all could have seen the game

2. without any fee whatever, will not relieve the defendant from liability in this case if you believe from the evidence, beyond a reasonable doubt, that the defendant played in the game, as alleged, on Sunday, and that some of the spectators paid a fee which was charged by the managers of the game in connection with the game of

baseball so played." It was sufficient to show that the exhibition was not free, and evidence of the payment of a fee by one or more persons is competent proof of that fact; nor is it necessarily given a different character by the fact that some persons saw the game without paying therefor. *State v. Hogueiver, supra.*

Judgment affirmed.

ST. JOSEPH COUNTY SAVINGS BANK v. RANDALL
ET AL., ADMINISTRATORS.

[No. 5,578. Filed March 6, 1906.]

1. DESCENT AND DISTRIBUTION.—*Creditors.—Rights to Personality.—Liability of Heirs.*—Creditors have the right, by properly filing their claims as provided by §2465 Burns 1901, Acts 1883, p. 151, §5, to share in the distribution of the personal estate of a decedent; and unless their claims are so filed, they can not afterwards collect same from heirs receiving such property. p. 404.
2. SAME.—*Creditors.—Mortgages.—Waiving Right to Share in Personality.*—A mortgagee of a decedent, by failure to file his claim as provided by §2465 Burns 1901, Acts 1883, p. 151, §5, waives his right to share in the decedent's personal property; and his sole right to collect such debt is to subject such mortgaged property to the payment thereof. p. 404.
3. BILLS AND NOTES.—*Attorneys' Fees.*—A stipulation in a note for attorneys' fees constitutes a contract of indemnity which is enforceable only when the maker commits a breach of the provisions of such note. p. 405.
4. SAME.—*Attorneys' Fees.—Decedents' Estates.*—A note, stipulating that the maker shall pay attorneys' fees, filed before maturity as a claim against the decedent's estate and properly allowed by the administrators, does not render such estate liable for attorneys' fees in the presentation of such claim. p. 405.

From Pulaski Circuit Court; *William A. Foster*, Special Judge.

St. Joseph County Sav. Bank v. Randall—37 Ind. App. 402.

Claim by St. Joseph County Savings Bank against Arthur T. Randall and another, as administrators of the estate of Jennie A. Gray, deceased. From a judgment in favor of defendants, plaintiff appeals. *Affirmed.*

M. Winfield, for appellant.

Burson & Burson, for appellees.

MYERS, J.—On June 22, 1904, appellant by its attorney filed in the office of the clerk of the Pulaski Circuit Court its claim for \$3,628.14 against the estate of Jennie A. Gray, deceased, represented by appellees. The claim is founded upon one principal promissory note for \$3,500 and five interest or coupon notes for \$175 each, all stipulating for attorneys' fees, and secured by mortgage on real estate. The notes are of date October 1, 1903, and none of said notes were due at the time of filing the claim, nor was appellees' decedent in any manner or form in default of any of the stipulations of any of said notes. In July or August, 1904, appellees, as administrators, duly allowed on the proper docket kept by said clerk, and on account of the claim filed, \$3,675, the same being the full face of said principal note and all interest due to October 1. The item of attorneys' fees, \$193.84, included as a part of the claim filed, was not allowed. On September 8, 1904, appellees paid to the clerk of said court for appellant \$3,675, who paid the same to appellant's attorney on September 12, who accepted and receipted to the clerk therefor in part payment, at the same time directing the clerk, unless balance of claim was allowed or paid during that term of court, to transfer the same to the issue docket. The remainder of the claim was not allowed or paid and was by the clerk transferred to the issue docket of such court. Issues were formed and a trial had before the court, resulting in a finding and judgment in favor of appellees.

By the errors here assigned, the question for decision is the right of appellant to collect from said estate its attor-

neys' fees for filing its claim with the clerk of the

1. Pulaski Circuit Court. By §2465 Burns 1901,

Acts 1883, p. 151, §5, it is provided: "No action shall be brought by complaint and summons against the executor or administrator of an estate for the recovery of any claim against the decedent, but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending." This provision of the statute was in force at the time of the execution of the notes, and upon a familiar principle the law then applicable became an element of such contract. *Pennsylvania Co. v. Clark* (1891), 2 Ind. App. 146. In the case at bar the claimant had the right to share in the distribution of the personal estate of the decedent, but in order to obtain this right it was required to file its claim as prescribed by statute. *Cincinnati, etc., R. Co. v. Heaston* (1873), 43 Ind. 172; *Beach v. Bell* (1894), 139 Ind. 167. And a failure thus to file its claim before final settlement of the estate would bar any right of action against the heirs, although they may have been recipients of a part of such estate. *Stults v. Forst* (1893), 135 Ind. 297, 304.

Another course was open to appellant, that of waiving its right to participate in the personal assets of the estate and look to its mortgage security for payment, in

2. which event it would have been relieved of the necessity of filing its claim. *Beach v. Bell, supra*.

It chose the remedy of filing its claim. This was its right given by law, and not on account of any breach on the part of the maker of the notes. By seeking payment from the administrators its right to share in the personal estate of the decedent was secured; but in order to be protected in these rights the law made it incumbent upon appellant to file its claim against the estate in the office of the clerk of the court in which the estate is pending. The expense necessary in preparing and presenting its claim to the

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clerk, appellant insists, is covered by the stipulation in the notes providing for attorneys' fees. This insistence is not well founded.

The stipulation in the notes for attorneys' fees is a contract of indemnity, and is effective only in case of a breach on the part of the maker, and by reason thereof the

3. holder of the notes has necessarily incurred a liability for attorneys' fees. *Judson v. Romaine* (1893), 8 Ind. App. 390; *Moore v. Staser* (1893), 6 Ind. App. 364; *Rouyer v. Miller* (1896), 16 Ind. App. 519.

In the case at bar there is no pretense of any breach on the part of the maker of the notes of any of the stipulations therein contained, and without a breach the ex-

4. penditure for attorneys' fees was not on account of any fault of the maker or her representatives, and not therefore chargeable to her estate. The cost of preparing and presenting the claim of appellant to the clerk was a matter for the claimant, and any expenditure made by it in the way of attorneys' fees is not covered by the clause in the note "and attorneys' fees." The undisputed facts in this case show that the claim was in nowise disputed, and was paid in full within a short time after it was filed, except that part demanding fees for its attorneys.

Finding no error in the record, judgment is affirmed.

SOUTHERN INDIANA RAILWAY COMPANY v. BAKER.

[No. 5,471. Filed March 6, 1906.]

1. PLEADING.—*Complaint.*—*Master and Servant.*—*Railroads.*—*Negligence.*—A complaint alleging that the train upon which plaintiff was riding "was in charge of the engineer and conductor, employes of defendant," and that the train with which it collided was "in charge of an engineer and conductor, employes of defendant," sufficiently shows that the engineers and conductors were in charge of the trains. p. 408.

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2. **MASTER AND SERVANT.—Railroads.—Negligence.—Evidence.**—Where the evidence shows that the plaintiff, an employe of defendant railroad company, was riding on a construction train to his place of work; that such train, in charge of the conductor and engineer, ran into a coal train causing plaintiff's injuries and that plaintiff did not know such coal train was on the track, a verdict for plaintiff was supported by the evidence. p. 408.
3. **SAME.—Railroads.—Collisions.—Presumption.**—A presumption of negligence from a collision of two trains on defendant's road does not arise in favor of an injured servant. p. 410.
4. **SAME.—Railroads.—Negligence.—Collisions.**—In an action by a servant against a railroad company for damages growing out of a collision of two trains, it is not necessary to prove that the train with which plaintiff's train collided was operated by defendant, the question of defendant's negligence being a question for the jury upon all of the evidence. p. 410.
5. **APPEAL AND ERROR.—Negligence.—Inferences.—Weighing Evidence.**—Where there is some evidence from which a jury could draw an inference of defendant's negligence, a verdict for plaintiff will not be disturbed on appeal. p. 411.
6. **TRIAL.—Argument of Counsel.—Misconduct.**—Where the court, upon defendant's motion, struck out objectionable remarks of counsel for plaintiff in the argument to the jury, and instructed the jury not to consider same, reversible error is not committed, no prejudice being shown against defendant. p. 411.
7. **SAME.—Instructions.—Railroads.—Conductors.—Engineers.—Negligence.**—An instruction that conductors and engineers of a railroad train are made vice-principals by statute, and an injury to plaintiff through a collision caused by the negligence of one or both of such officials, where the plaintiff was without fault, renders such railroad company liable, is not objectionable. p. 412.
8. **SAME.—Instructions.—How Considered.**—Instructions must be considered as an entirety, and if they fairly state the law of the case, there is no reversible error. p. 412.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Action by LaFayette Baker against the Southern Indiana Railway Company. From a judgment on a verdict for plaintiff for \$375, defendant appeals. *Affirmed*.

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*F. M. Trissal and Brooks & Brooks, for appellant.
McCormick & Gilkison, Arnold Padgett, J. A. Padgett
and David Padgett, for appellee.*

WILEY, J.—Appellee was an employe in appellant's service in the capacity of a brakeman, and while so employed was injured by a collision between two trains. This action was prosecuted by him to recover damages for the injuries thus sustained. His complaint was in one paragraph, to which a demurrer for want of facts was overruled. The answer was in one paragraph. Trial by jury resulting in a general verdict in his favor, and, over appellant's motion for a new trial, judgment was rendered thereon.

The overruling of the demurrer to the complaint and the motion for a new trial are assigned as errors.

After averring that appellant is a corporation, owning and operating a line of railroad within the State of Indiana, the complaint avers that on November 2, 1903, appellee was engaged as a brakeman upon one of appellant's trains, running from Latta to Sullivan in said State; that the train was composed of an engine, tender and caboose, and was in charge of an engineer and conductor, employes of appellant; that on that day, and wholly unknown to appellee, a freight-train, composed of a tender, engine, ten or more loaded cars of coal and a caboose, in charge of an engineer and conductor, employes of appellant, was coming from Gilmore, on the line of appellant's road, toward the train on which appellee was a brakeman; that at a point between Latta and Gilmore, while the train on which appellee was employed was moving at the rate of twenty miles an hour, and while he was standing by the side of a door in the aisle of the caboose, acting under his orders as such brakeman, and without any fault on his part, said train and the train of coal-cars, engine and tender, as aforesaid, "were, by the negligence of the officers of said company, and by the carelessness and negligence of the engi-

neers and conductors in charge of said trains, carelessly and negligently run violently against and upon each other, thereby causing a collision," and producing injuries to appellee which are specifically described, and by which he avers he was permanently disabled and unfitted for hard manual labor, and from pursuing his occupation as a rail-way brakeman, to his damage in the sum of \$5,000.

The only objection urged to the complaint is that it does not allege by direct averment that the officers, engineers and conductors of the two trains were in

1. charge of the trains; that it does not allege directly, but only by recital, that these men had anything to do with the trains at the time of the collision. We do not so read the complaint. It is specifically averred that the train upon which appellee was riding "was in charge of the engineer and conductor, employes of defendant;" also that the train with which it collided was "in charge of an engineer and conductor, employes of defendant." As this is the only objection pointed out to the complaint, it is not well taken. The demurrer was properly overruled.

In their brief counsel for appellant address the principal part of their argument to the proposition that there is an entire lack of evidence to sustain the verdict. A

2. résumé of the evidence, so far as it is material to the determination of this question, will disclose the basis of counsels' contention. The evidence is embraced within very narrow limits, and the facts disclosed thereby, which have any material bearing upon the issues, are few. Appellee, his father and two employes of appellant were the only witnesses introduced, and they all testified on behalf of the appellee. By appellee's evidence it is shown that he was a brakeman in the employ of appellant, and at the time of the accident was on a construction-train. As such brakeman it was his duty to assist in switching and making up trains, and to help guard and safely handle trains. He was required to look for obstructions and see

that switches were all right and safe for signals. He was required to look to the conductor for orders. It is also disclosed by his evidence that a "spur line" starts from Latta, on the main line of appellant's road, and runs south eight or ten miles; that the train he was on when injured consisted of an engine, tender and caboose. The train left Latta, going south about 7:10 o'clock in the morning. The conductor was a person by the name of O'Day, and the name of the engineer was Gibson. There was a head brakeman by the name of Stafford, and a fireman. They were all employes of appellant. The train was going at fifteen or twenty miles an hour, and in rounding a curve it ran into engine number twenty-five, "or a coal-train." When the train left Latta appellee did not know that another train was on the track. He did not receive any orders from the train dispatcher. Orders from the train dispatcher were always received by the conductor and engineer. The train he was on was going to a steam shovel and pile-driver to take the men to work, and said men were on the caboose with him. Appellee also testified that it was the custom to send out a flagman in the direction of another train which might be approaching; and in such case it was the duty of the engineer to slow down and pick up the flagman. He did not know that any flag was used ahead of this train, and did not know whether the engineer saw and ran by any flag. The evidence of appellee's father was simply to the effect that appellee could not stand to do the work he could before he was injured. A witness by the name of Silver was on the same train with appellee. He testified that he was fireman on the steam shovel and saw appellee after the accident, and noticed some cuts and bruises on his face and head. A witness by the name of Bowman testified that he was in the employment of appellant as a bridge-man; that he was in the caboose with appellee at the time of the accident; that he did not know that another train was on the track; that there was no telegraph station be-

tween Latta and the point of collision; and that after the collision he observed the other train.

* This is all the evidence that gives any account of the running of the train and the manner of the accident. Under the question raised by the motion for a new trial, that the verdict is not sustained by sufficient evidence and is contrary to law, we must determine from the facts disclosed by this evidence whether appellee made out his case. In this connection it is important to keep in mind the negligence of which he complains. That negligence in the language of the complaint is that "by the negligence of the officers of said company, and by the carelessness and negligence of the engineers and conductors in charge of said trains," they (the trains) "carelessly and negligently ran violently against and upon each other," etc. The complaint clearly states the cause of appellee's injury, and that cause was the negligent collision of two of appellant's trains going in opposite directions. The evidence is ample to establish the fact of the collision, and also the fact that the train upon which appellee was riding was in charge and control of a conductor and engineer who were employes of appellant. The evidence also establishes the fact that appellee was injured.

It is urged by counsel for appellant, that the evidence goes only so far as to show that an accident did occur, and that injury therefrom resulted to appellee, but that

3. the evidence does not show any negligent act chargeable to appellant. They assert the well-settled proposition, that the occurrence of the accident did not create a presumption of negligence because of the fact that appellee was not a passenger but an employe. True, there is no presumption of negligence in such case; but negligence must be proved. If it was necessary

4. for appellee to prove that the train No. 25, with which the train upon which he was riding collided, was in charge of and being operated by appellant or its

servants, then he has failed to make his case, for no such evidence is to be found in the record. But we do not think that this was essential to his right to recover. Where negligence is the foundation of an action it is for the jury to consider all the evidence pertinent thereto, and it is its province, also, to indulge reasonable inferences deducible therefrom, and from such evidence and such inferences determine the question of negligence.

In 1 Elliott, Gen. Prac., §437, it is said: "Negligence is usually considered to be a mixed question of law and fact. In other words, the existence or nonexistence of negligence in any particular case where the facts are in dispute or more than one reasonable inference can be drawn is a question for the jury to determine under proper instruction from the court." See, also, *Indiana Car Co. v. Parker* (1885), 100 Ind. 181.

Under the well-settled rule in this State, there being some evidence in the record in support of the negligence charged, and there being reasonable inferences

5. which the jury were authorized to draw, supportive of such negligence, we can not disturb the judgment upon the evidence.

Counsel have discussed two other questions under the motion for a new trial. (1) Misconduct of appellee's counsel; (2) the giving of instruction four upon the

6. court's own motion. We will dispose of these questions in their order. In the argument of the case counsel for appellee made statements to the jury which are subject to the severest criticism and condemnation. Objections were made to such statements, the court immediately sustained such objections, and thereupon instructed the jury fully that it was its duty to disregard such statements, and determine the rights of the parties according to the evidence and the law, as given by the court. In this regard the trial court promptly discharged its duty, and under its instructions we can not believe that appellant's

rights were in anywise prejudiced by what counsel had said.

This court, in the case of *White v. State* (1906), *ante*, 95, had under consideration the question now before us. In that case, after a review of the authorities, it was held that a reversal for misconduct of counsel in argument to the jury will be ordered by an appellate tribunal only where the improper statements of counsel are of such material character as it appears to be probable that they were the means of securing a wrong verdict. It does not appear to us that under instructions of the court in this case the misconduct of counsel for appellee had any influence upon the jury in making its verdict, and, this being true, it is not ground for reversal.

The court gave a number of instructions, and appellant complains of one only. We do not deem it necessary to set out this instruction in full, and will refer to it in the

7. abstract. The court told the jury that conductors and engineers, engaged in running and operating railway trains, are by law made vice-principals, and that their acts and negligence are made the acts and negligence of the principal. The court then told the jury that should they find from a fair preponderance of the evidence that while appellee was in appellant's service he was injured by reason of the collision of the train upon which he was riding with another train, and that such collision was caused by the negligence of the conductors and engineers of said trains, or either of them, and that appellee was without fault, then they should find for him.

We do not see any tenable objection to this instruction, and none has been pointed out to us. Taking the instructions as a whole, and considering them together, as

8. we are required to do, they fairly state the law.

It is our duty to consider instructions as an entirety, and even if some particular instruction, or some portion of an instruction, standing alone, or taken abstractly, not

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explained or qualified by others, be erroneous, it would afford no ground for reversal. *Gemmill v. Brown* (1900), 25 Ind. App. 6, and authorities there cited. This being true, if it be conceded, as it is earnestly insisted by counsel for appellant, that instruction four is erroneous, still we would not be justified in reversing the judgment for that reason.

Considering the entire record, we have reached the conclusion that the case was fairly tried, and the correct result reached. The judgment is affirmed.

**CLEAR CREEK STONE COMPANY v. CARMICHAEL,
BY NEXT FRIEND.**

[No. 4,732. Filed March 28, 1905. Rehearing denied November 28, 1905. Transfer denied March 6, 1906.]

1. **PLEADING.—Complaint.—Master and Servant.—Employers' Liability Act.**—A complaint showing that plaintiff was ordered to do certain work by defendant's foreman, to whose order plaintiff was bound to and did conform, in reference to turning a channeling machine, and that in doing such work such foreman, without waiting for plaintiff's signal to start, negligently gave an order to other workmen to turn such machine, thus catching plaintiff and crushing him before he could escape from his dangerous position, states a cause of action under §7083 Burns 1901, Acts 1893, p. 294. p. 415.
2. **SAME.—Complaint.—Master and Servant.—Negligence.—Knowledge.**—In an action by a servant for negligence it is not necessary to allege actual knowledge on the part of defendant's foreman who negligently gave an order, by reason of which plaintiff was injured, proof of actual or constructive knowledge being sufficient to establish negligence. pp. 417, 419.
3. **MASTER AND SERVANT.—Employers' Liability Act.—Conforming to Orders.**—Where a servant was employed to do certain work under the direction of a foreman, a part of which was to do certain things preparatory to turning a heavy machine, in the doing of which he was injured by reason of a negligent order of the foreman, he is considered in the doing of such things as conforming to the orders of such foreman. *Grand Rapids, etc., R. Co. v. Pettit*, 27 Ind. App. 120, distinguished. pp. 417, 420.

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4. **TRIAL.—Instructions.—Requisites.**—Instructions should briefly, plainly and concisely state the law applicable to the evidence as viewed upon the theories of plaintiff and defendant. p. 418.
5. **SAME.—Instructions.—Covered by Those Given.**—Where instructions requested are substantially covered by those given, no error is committed in refusing those requested. p. 419.
6. **SAME.—Interrogatories to Jury.—Right of Counsel to Discuss.**—Counsel have the right to discuss interrogatories submitted to the jury and to argue that certain facts inquired about are established by the evidence in a certain way. p. 419.

From Brown Circuit Court; *W. J. Buckingham*, Judge.

Action by Frank Carmichael, by his next friend, against the Clear Creek Stone Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Duncan & Batman and *Anderson Percifield*, for appellant.

East & East, for appellee.

ROBY, J.—This action was brought by Frank Carmichael, a minor, suing by his next friend Bridget Carmichael. The Consolidated Stone Company and the appellant were made defendants. During the trial appellee dismissed as to the Consolidated Stone Company, proceeding to final judgment against appellant.

The complaint was in one paragraph. The demurrer to it was overruled and issue formed by general denial. With its verdict the jury returned answers to certain interrogatories. Appellant unsuccessfully moved for judgment thereon, and appeals from a judgment in accordance with the general verdict for \$2,500.

Errors assigned are based upon the overruling of the demurrer to the complaint, the motion for judgment notwithstanding the general verdict, and the motion for a new trial.

It is averred in the complaint that appellant was a corporation owning and operating a stone-quarry and certain

machinery, and having a large number of employees

1. in its service, including said Frank Carmichael, who was performing the duties of "channeler runner;" that on September 13, 1900, and prior thereto, appellant had selected, appointed and authorized George Moore as derrick boss and foreman, and had given him full authority to control and manage the work in said quarry, the manner of its performance, and to give orders to different persons employed therein; that appellant's employees were subject to the orders and directions of said Moore, and were bound to and did conform to such orders at the time of the injuries complained of; that prior to said date appellant had channeled a large quantity of stone, and in so doing had left walls several feet high in said quarry running both north and south, and east and west; that on said day it was necessary that the channeling machine on which Carmichael was employed be turned around from its position north and south so that it would run east and west on the ledge in said quarry; that said machine weighed about eight tons, and that it was lifted and turned by attaching large metal pieces called "bales" to the machine, and then putting a steam derrick in operation; that it was the duty of said Carmichael, in obedience to orders and directions of said Moore, to fasten the bales to said machine, and when so fastened, and when he had removed himself to a place of safety away from said machine, to notify said Moore by a signal given with the hand, so that Moore could then order the power man to hoist and turn said machine; that said machine was standing north and south parallel with a high stone wall, and about two feet therefrom; that a few feet from the north end thereof there was another wall running east and west, the space between it and the machine being occupied by blocks of stone, drills and barrels; that in conformity to the orders and directions of said Moore said Carmichael attached said bales to said machine, they being fastened to the boom pole of the

derrick, and thereupon, without waiting for any signal, and before Carmichael could escape from his position, said machine suddenly started upward and swung against and upon him forcing him against the wall, crushing and maiming him, and inflicting permanent and serious injury; that at the time of said injury said Moore knew, or with reasonable diligence could have known, that the giving of said order to the power man to hoist said machine while said Carmichael was in the space between said machine and the wall would render the place dangerous and unsafe to him, and that said machine would, when hoisted, likely swing towards said wall, and catch and injure him; that it was dangerous to order said machine hoisted before appellee had notified him to do so, and before he had removed to a place of safety, but that with all of such knowledge said Moore, in charge as aforesaid, and while appellee was in the line of his duty, obeying and conforming to the order and direction of said Moore, and without any signal from appellee or any one else, and before he had time to remove from his position, negligently ordered and directed the power man to hoist said machine; that the power man obeyed said order; that said machine was then and there suddenly raised and swung against him, inflicting the injuries complained of. It is further averred that Carmichael had no knowledge that said Moore would give said order; that he did not know the place where he was working was unsafe, and did not know that the same would be made unsafe, but that he relied upon the fact that it was reasonably safe and would so remain; and that he was injured by reason of the negligence set out.

The objection to the complaint is that it does not show that Carmichael went between the machine and wall in obedience to Moore's order, or that he was there performing any duty thus enjoined, or that Moore knew he was there at the time the signal to hoist was given. The averment is that the bales were attached by order of Moore. The

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presence of the employe at the place where such attachment was to be made was incident to the execution of the order, and until the employe had time to leave such place he must be held to have been there in conformity to the direction given him.

It was not necessary, to make the complaint good as one based upon negligence, to allege that Moore knew of the presence of the employe at the time he gave the

2. order to hoist. His duty was measured by the care which a reasonably prudent man under the same circumstances would or should exercise. It appears from the pleading that the injury complained of was caused by the negligence of a person in the service of the appellant corporation, to whose order the injured employe was bound to and did at the time conform. The demurrer was therefore correctly disposed of. §7083 Burns 1901, cl. 2, Acts 1893, p. 294, §1; *Indianapolis Gas Co. v. Shumack* (1899), 23 Ind. App. 87; *Louisville, etc., R. Co. v. Wagner* (1899), 153 Ind. 420; *Thacker v. Chicago, etc., R. Co.* (1902), 159 Ind. 82, 59 L. R. A. 792.

In support of the motions it is urged that the answers to interrogatories and the evidence alike show it to have been the duty of the person injured, as a part of

3. his employment, to attach the bales to the machine, and that therefore he was not, in so doing, conforming to the order of Moore.

In *Grand Rapids, etc., R. Co. v. Pettit* (1901), 27 Ind. App. 120, a distinction is drawn between general and special orders. An extended quotation is made from *Mobile, etc., R. Co. v. George* (1891), 94 Ala. 199, 10 South. 145. In this case it was said: "There being no evidence that the yardmaster gave plaintiff any order or direction to uncouple the car from the engine at the time of his injury, he has failed to establish one of the essential statutory propositions."

It has not been held that the employe must be ordered to perform some task not contemplated by his original employment, in order that he come within the provisions of the second subdivision aforesaid. If a special order is given, to which it is his duty to conform, directing him to do a particular thing, and at the time of his injury he is conforming to such order, he is, in this regard, within the statute.

There is a substantial difference between the general duty to do a certain class of work and the duty of doing some portion or detail of such work at a stated time or place, or in accordance with specific directions relative thereto, to which the order of the person in charge must frequently be directed. *Indiana Mfg. Co. v. Buskirk* (1904), 32 Ind. App. 414. Lifting and turning the machine was the proximate cause of the injury, and directing the appellee into a dangerous situation and ordering the machine lifted and turned without exercising reasonable care to learn that he had left such position, together constituted the actionable wrong complained of. *Evansville, etc., R. Co. v. McKee* (1885), 99 Ind. 519, 50 Am. Rep. 102; *Louisville, etc., R. Co. v. Wagner, supra*; *Thacker v. Chicago, etc., R. Co., supra*.

The court refused to give a number of instructions requested by the defendant. It gave seven which were so requested. It gave fifteen at the request of the plaintiff and fifteen upon its own motion. The purpose of instructing the jury is to assist it. Instructions are given and understood as a whole, and ought to contain a connected, clear and reasonably concise statement of the issues and of the law applicable to the facts upon the hypothesis of both the plaintiff and defendant. A few plain instructions so drawn are vastly preferable to those which are intricate and involved, the meaning of which lawyers having ample time and assistance are able to comprehend with difficulty. Thornton, Juries and Instructions, §213.

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The trial judge who states the law applicable in such a manner as will enable the jury to follow and understand him does his duty. The instructions given in this

5. case are clear and correct. The substance of those refused is contained in those given, and the issue was fairly presented to the jury.

One of appellee's attorneys in the closing argument read and discussed certain interrogatories which the court had indicated he would submit to the jury, pointing

6. out what answers ought to be returned thereto.

Interrogatories are only properly submitted to the jury when they are directed to "particular questions of fact." Argument directed to questions of fact involved in the case on trial is germane and essential. No abuse of discretion by the court is shown in this case.

Judgment affirmed.

ON PETITION FOR REHEARING.

ROBY, J.—The negligence counted upon arises from the failure of Moore to use reasonable care to avoid the infliction of injury upon the employe. Having directed

2. Carmichael to do work which required him to be between the wall and the machine, he gave, prematurely, a signal for hoisting the machine, without concerning himself as to Carmichael's safety. By the exercise of such reasonable care as he was bound to exercise, he might have known that which it is asserted that he did not know. The law therefore imputes such knowledge to him. If this were not so, one by shutting his eyes could always furnish an excuse. It is not intended to hold that negligence may exist without knowledge of the conditions which create it, but that such knowledge may be constructive as well as actual.

In *Grand Rapids, etc., R. Co. v. Pettit* (1901), 27 Ind. App. 120, the facts stated in the opinion were: "That no

special order was given by the conductor in relation
3. to the particular work to be done; that the only thing said by the conductor was: 'Let us hurry up boys and get out of here;' that nothing said by the conductor had anything to do with appellee's injury." In the case at bar, it is shown that a special order was given by Moore, and that the appellee was injured while conforming thereto, as he was bound to do. To say that there can be no liability, if the direction pertained to work for the doing of which the servant is employed, would be to write into the statute new terms contrary to its general import and purpose. The employe was injured while acting in conformity with a special order, at a particular place and time, doing work which was in keeping with his employment.

Appellant's counsel, in their forceful brief on this petition, assail certain instructions. It seems to us that the case was fairly left to the jury, and, while the instructions are not beyond criticism, the distinctions made are not such as would be likely to influence the result.

Petition overruled.

TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY v. PRITCHARD.

[No. 5,649. Filed March 7, 1906.]

1. **TRIAL** — *Instructions. — Carriers. — Passengers. — Ejection. — Unnecessary Force.*—An instruction that the carrier is liable for the use of unnecessary force in the ejection of a passenger is within the issues where one paragraph of the complaint alleges an assault and battery upon plaintiff after presentation of his ticket, and another paragraph, before time was given for a presentation of his ticket, especially where the jury was further instructed that a passenger must not only have his ticket but must tender it when demanded. p. 422.

Terre Haute, etc., R. Co. v. Pritchard—37 Ind. App. 420.

2. TRIAL.—*Carriers.—Passengers.—Ejection.—Pleading.—Evidence.*—Where a complaint alleges that the conductor of defendant company's train forcibly ejected plaintiff and in so doing greatly bruised plaintiff about the head, face and body, evidence that plaintiff's ear drum was injured and his hearing impaired is admissible. p. 423.

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Action by Del Pritchard against the Terre Haute & Indianapolis Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

James L. Clark and *John G. Williams*, for appellant.

Brill & Harvey, for appellee.

COMSTOCK, J.—Action to recover damages for the alleged wrongful ejection of appellee from appellant's cars on May 9, 1896. The complaint is in two paragraphs. The first alleges that the plaintiff purchased from the defendant's agent at Amo, Hendricks county, a round-trip ticket entitling him to ride on its line of cars from said town of Amo to said city of Indianapolis and return, and took passage on said road on said date, and rode over said line of railroad from Amo to Indianapolis, and surrendered to the conductor in charge of said train that portion of his ticket which entitled him to ride to said city of Indianapolis, and retained that portion of said ticket which entitled him to ride on said day from said city of Indianapolis to said town of Amo, and on said day plaintiff took passage on the defendant's cars at the city of Indianapolis for said town of Amo with said return ticket in his possession; that while plaintiff was so riding on defendant's cars the defendant's agents and employes in charge of said train wrongfully and violently assaulted him, and although plaintiff tendered to the regular conductor his ticket which entitled him to ride to said town of Amo, said conductor violently choked him, struck him several heavy blows in the face, kicked him on the head and body, and stopped

said train and forcibly ejected plaintiff from said cars, in the country, at no regular station, more than ten miles from said town of Amo; that plaintiff never at any time refused to deliver his said ticket, and was in all things conducting himself in a gentlemanly and orderly manner; that by reason of said assault the plaintiff was greatly bruised about the head, face and body, and was compelled to walk to Plainfield, a distance of about three miles, etc. And by reason of said assault he became nervous, prostrated and humiliated, all to his damage in the sum of \$1,000, etc.

The second paragraph is the same as the first, except that it alleges that plaintiff was assaulted "before he was given an opportunity to produce said ticket, and the conductor in charge of said train continued to beat and bruise him on the face and body, although the plaintiff was making no resistance; that all of said time plaintiff was hunting for his ticket, and so stated to said conductor, and told him (said conductor) that he had in his possession a ticket entitling him to ride to said town of Amo, and asked him (said conductor) to allow him to find said ticket, but said conductor continued to beat and bruise him, without allowing him an opportunity to find said ticket, and with great violence ejected him from said cars."

The cause was put at issue and the trial by jury resulted in a verdict on which judgment was rendered in favor of plaintiff in the sum of \$300. Appellant's motion for a new trial was overruled. That action of the court is relied upon for reversal of the judgment.

The giving of instruction three is made one of the reasons for a new trial. Said instruction reads as follows:

"A conductor or agent on a railroad train has a

1. right to expel a passenger for the nonpayment of his fare, or upon his refusal to deliver his ticket within a reasonable time, but he has no right to use any more force than is reasonably necessary for that purpose; and in this case, even if you should find that the plaintiff

refused to pay his fare or surrender his ticket, the agent of the company had no right to use unnecessary force or violence toward the plaintiff, and if you find that he did use more force than was reasonably necessary, you should find for the plaintiff." It is contended that the giving of this instruction was error, because "upon a theory not set up in the pleadings nor within the evidence in this cause;" that the complaint proceeds upon the theory that the plaintiff was rightfully upon appellant's train, and was wrongfully ejected; that the instruction is on the theory that he was wrongfully on defendant's train and was properly ejected, except that excessive force was used. We think it proper in this connection to set out instruction two, given. It is as follows: "It is not sufficient that a passenger has a ticket in his possession, but he must offer to surrender it, and actually tender it to the proper conductor, when demanded, to entitle the passenger to the rights of a passenger." Appellee testified that he had the ticket in his possession, but was unable to find it upon demand; and that he offered to pay his fare. The conductor of appellant's train testified that the plaintiff refused to give a ticket or to pay his fare. These instructions, we think, are pertinent to the pleadings, and within the evidence. Some fault is found with other instructions; but, considered together, they fairly present the law, and were not prejudicial to appellant.

Objection was made and overruled to certain questions addressed to W. M. O'Brien, witness for the plaintiff.

They were as follows: "What effect upon the hear-

2. ing or tingling sound of the ear, such as he showed you at the time, have upon the patient's hearing?

A. Of course there might be a congestion of the drum, due to the status of blood, or something of that nature that caused a congestion or stopped the circulation to some extent. I will ask if from that time to the present, if a patient had a kind of ringing noise in his ear at the time,

if it could be attributed to the injury that you observed there near his ear, which you have described? A. It is probable it could be. I will ask you if he had never had any bruises or gashes or cuts about the location of his ear until that particular time, and from the time of receiving it he had a ringing noise in his ear, and was slightly deaf or his hearing impaired, if that could be attributed to the injury you found at that time? A. Yes; I think so."

The admission of this testimony is also set out as a reason for a new trial. It is argued that this testimony was inadmissible, because "there is no allegation in the complaint that said injury was received by the plaintiff." The complaint alleges that the plaintiff was greatly bruised about the head, face and body. This allegation was sufficient to authorize the introduction of evidence of particular injuries to the head and face, including that to the senses of sight and hearing. There is evidence in support of the verdict, and we find no reversible error.

Affirmed.

CONCURRING OPINION.

ROBY, C. J.—I think the motion for a new trial ought to have been sustained; but there is evidence tending to support the verdict, and I therefore reluctantly concur.

INDIANA TRUST COMPANY v. JEFFERSON TOWNSHIP.

[No. 5,549. Filed March 7, 1906.]

1. TOWNSHIPS.—*Incurring Indebtedness.*—*Notice.*—*Officers.*—All persons dealing with a township trustee must take notice of the limits of his power to bind his township. p. 427.
2. SAME.—*Auditing Board.*—*Powers.*—*Indebtedness.*—Under the act of 1897 (Acts 1897, p. 222) the auditing of an unauthorized township warrant by the auditing board did not give such warrant any validity, such act being intended to circumscribe and not to enlarge the powers of township trustees. p. 429.

Indiana Trust Co. v. Jefferson Tp.—37 Ind. App. 424.

3. TOWNSHIPS.—*Borrowing Money When Unnecessary.—Recovery.*—A township warrant issued by a township trustee on his road fund, where such fund had enough money to pay its expenditures, although approved by the auditing board, is not enforceable. p. 429.

From Boone Circuit Court; *Samuel R. Artman*, Judge.

Action by the Indiana Trust Company against Jefferson Township. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Ayres, Jones & Hollett and *B. F. Ratcliff*, for appellant.
T. J. Terhune and *Roy W. Adney*, for appellee.

BLACK, P. J.—The appellant brought suit against appellee. The court rendered a special finding, dated December 12, 1903, and the appellant excepted to the conclusions of law stated upon the facts specially found. The question as to the correctness of the court's conclusions of law is the only one presented on appeal.

The facts were stated substantially as follows: The appellant is a corporation duly and legally organized under the laws of this State. Benjamin F. Moore, September 7, 1897, was the duly elected, qualified and acting trustee of the appellee, Jefferson township, Boone county, Indiana, and on that day he applied to and procured from the appellant a loan of \$1,200, and as evidence thereof he, in the name of B. F. Moore, as trustee, then made two township warrants of \$600 each, upon the road fund of that township, payable to the appellant, one of which is the warrant described in the complaint herein, as follows:

"\$600. State of Indiana, Boone county, Jefferson township, in the county and State aforesaid, will pay to the order of the Indiana Trust Company \$600 out of the road fund, for borrowed money, payable at the office of the Indiana Trust Company of Indianapolis, on or before the 20th day of June, 1900. Value received, waiving valuation and appraisement laws of the State of Indiana, with interest thereon, at the rate of six per cent per annum payable semiannually, from

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the 10th day of September, 1897, until paid, and attorneys' fees.

Dated September 7, 1897. Per B. F. Moore, trustee of Jefferson township, Boone county, Indiana."

On September 7, 1897, said Moore presented this warrant to the auditing board of Boone county, in regular session, and the warrant was then audited by that board, and the following minute of its approval was written upon the face of the warrant:

"Audited and approved September 7, 1897, by the auditing board of Boone county, Indiana. Thomas M. Shaw, president, Enos Kendall, secretary."

This warrant, together with the other \$600 warrant, was delivered September 16, 1897, by said Moore to the appellant, at the city of Indianapolis, and the appellant then executed to said Moore a check for \$1,200, drawn on the Merchants National Bank of Indianapolis, Indiana, which check was cashed by Moore on that day at that bank, and he then and there received thereon the sum of \$1,200. Following the receipt of this money, Moore paid out \$650 of the same for road graders, tools and implements, labor and material used in the repair of the public highways of Jefferson township, Boone county, Indiana, and for sewer-tile and bridges, which were also used in repairing the public highways of that township, all of which tools, implements, tile, bridges, labor and material were suitable, useful and necessary for the repair and preservation of said highways, and all of which the appellant still retains. It was found by the court to be impossible to determine from the evidence how much or what portion of said \$650 was realized upon the \$600 warrant described in the complaint. Since Moore had taken upon himself the exercise of the duties of the office of township trustee, he had received the sum of \$5,880.60 belonging to the road fund of said township before "September 7, 1903." He had paid out of said fund, on account of expenses of said

township and had taken credit for labor quietuses, up to and including said date, the amount of \$5,018.84; and there was a balance of \$870.66 belonging to the road fund of said township in the hands of Moore "on the 7th day of September, 1897." He had in his hands on that date more than \$200 of the road fund of that township, in excess of the amount that he paid out on claims for graders, tools, implements, sewer tile, bridges, labor and material, out of the money received from the plaintiff. On the date last mentioned there was no necessity for Moore, as trustee of that township, to borrow money with which to pay claims against the road fund of that township.

Upon the foregoing facts the court concluded the law to be that the appellant was not entitled to recover, and that the appellee was entitled to judgment for costs.

The action was one for the recovery of the borrowed money, with interest thereon. There were two paragraphs of the complaint, in the first of which a warrant or note for \$600 payable out of the road fund was set out. The second referred in like manner to the issuance of a warrant or note for \$600, without setting it out. There is some uncertainty as to whether the appellant intended to proceed for the recovery of the \$600 and interest thereon represented by the one warrant set out, or for the recovery of that amount, with interest, under each paragraph, though the court appears to have gone upon the theory that the suit was one for the recovery of the sum represented by one warrant alone; that amount and a comparatively small additional sum having been expended upon the highways of the township out of the whole sum borrowed upon the two warrants.

That a township trustee has no general authority to bind his corporation by creating a debt against it, but is a special agent of the township with limited statutory author-

1. ity, and that all who deal with him as such agent must take notice of the nature and extent of his

authority, are matters well established. If he acts in excess of his powers those who deal with him must be treated as having information of his lack of authority in the premises, and the township can not be bound by estoppel or otherwise, beyond his limited authority. *Union School Tp. v. First Nat. Bank* (1885), 102 Ind. 464; *Snoddy v. Wabash School Tp.* (1897), 17 Ind. App. 284; *State, ex rel., v. Board, etc.* (1897), 147 Ind. 235.

In *Union School Tp. v. First Nat. Bank*, *supra*, it was held as controlling that the money borrowed by the trustee was paid out when the school corporation had money of its own in the hands of the trustee. "When money was supplied from the public revenues, it was the duty of the trustee to use it in paying claims against the school corporation, and he had no authority to procure money from other sources and thus create a debt against the corporation. With school funds in his hands, he had not the slightest right to borrow money or create a debt." Again, it was there said: "It is only in cases where there is a necessity for borrowing money, and where equity requires that the lender shall be subrogated to the rights of the creditor whose debt was paid with the lender's money, that the school corporation is held liable. * * * There was no necessity for borrowing money, for the public revenues had supplied all that was needed." It was further said that the lender was bound to take notice of the extent of the authority of the trustee, "and this imposed upon it the duty of ascertaining whether the public had supplied the needed funds." And on petition for a rehearing it was said to be too clear for argument that where the trustee has funds of the corporation in his hands, he can not plunge it into debt. See, also, *Clinton School Tp. v. Lebanon Nat. Bank* (1897), 18 Ind. App. 42.

The approval of the warrant by the advisory board seems to have been made in pursuance of the act of March 8,

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1897 (Acts 1897, p. 222), which was repealed in

2. 1899 (Acts 1899, p. 150, §7, §8085g Burns 1901).

Concerning this statute of 1897 it was held in *Mitchelltree School Tp. v. Hall* (1904), 163 Ind. 667, that it was not intended thereby to enlarge the extent of the powers of township trustees, but further to circumscribe their authority in respect to the issuing of warrants; that the auditing board thereby created was not a tribunal to adjudicate questions between the civil or school township and persons claiming to be its creditors, but merely a ministerial body whose stamp of approval was necessary to the issuance of a warrant in the investigation of which said creditors were not parties. See *Coombs v. Jefferson Tp.* (1903), 31 Ind. App. 131.

In the case before us, the action, as before stated, is for the recovery of borrowed money, which by the terms of the warrants given for it was made payable out of the

3. road fund, and a certain amount of which was actually used in the repairing of the highways; but at the time of borrowing the money and at the time of so expending a portion of it, the trustee had on hand money of that fund more than sufficient to pay for such repairs. There does not appear to have been any necessity whatever for borrowing the money, but the contrary fact affirmatively appears. Of this the lender was bound to take notice. The loan was wholly unauthorized, and could not furnish the basis of liability on the part of the township.

Judgment affirmed.

WHITESELL V. STUDY.

[No. 5,521. Filed March 7, 1906.]

1. PLEADING.—*Complaint.*—*Malicious Prosecution.*—A complaint for malicious prosecution must allege that the prosecution was malicious, without probable cause, and resulted favorably to defendant therein, the present plaintiff. p. 432.

2. **MALICIOUS PROSECUTION.**—*Civil Actions.*—*Elements.*—Where plaintiff instituted a civil action against defendant maliciously and without probable cause, and such action terminated in defendant's favor, a civil action lies against such plaintiff for damages, and it is immaterial whether such action was begun by process of attachment or by summons. p. 432.
3. **PLEADING.**—*Complaint.*—*Malicious Prosecution.*—*Criminal.*—*Civil.*—A complaint for malicious prosecution, criminal or civil, which shows that the action against plaintiff terminated in a judgment against plaintiff is bad. p. 433.
4. **PROCESS.**—*Malicious Abuse of.*—*Unlawful Purpose.*—Where legal process was successfully used in one case to have a widow's election set aside, and in another for the collection of a valid debt, no unlawful end being demanded or required in either case, an action against the plaintiff therein for malicious abuse of process will not lie. p. 433.
5. **SAME.**—*Malicious Intent.*—Where plaintiff uses legal process for the purpose of enforcing his legal or equitable rights, his malicious motive is immaterial. p. 434.
6. **PLEADING.**—*Complaint.*—*Deceit.*—A complaint for deceit which shows that the deceit, if any, was not practiced upon plaintiff is bad. p. 435.
7. **ATTORNEY AND CLIENT.**—*Deceit.*—*Collusion.*—*Statutes.*—An attorney is liable to his client under §984 Burns 1901, §972 R. S. 1881, for deceit or collusion causing injury to such client. p. 435.

From Wayne Circuit Court; *W. O. Barnard*, Special Judge.

Action by Elmira J. Whitesell against Thomas J. Study. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Samuel C. Whitesell, for appellant.

B. F. Mason and *Thomas J. Study*, in *pro. per.*, for appellee.

ROBINSON, J.—A demurrer for want of facts was sustained to appellant's amended complaint, and on her refusal to plead further judgment for appellee was rendered.

The complaint is very long, and it is difficult to tell upon what theory the pleader intended to proceed. Counsel for appellant claims in his brief that the complaint states a

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cause of action for damages for malicious prosecution, for abuse of process and for deceit.

Amos Strickler died October 23, 1899, seized of certain land. Appellant, a daughter of Amos Strickler, afterward, in March, 1900, purchased at administrator's sale the undivided two-thirds of the land, and Elizabeth Strickler, the widow of Amos Strickler, conveyed the undivided one-third of the land to appellant for the consideration, stated in the deed, which was made a charge on the land, that appellant, her daughter, should provide her a home, the necessities and comforts of life, and have her expenses of sickness and funeral paid. Appellant borrowed the money to pay for the two-thirds, and executed a mortgage on the land to secure the loan, in which mortgage Elizabeth Strickler joined. The mortgage was afterwards, in 1903, foreclosed, and in January, 1904, the land sold under the decree for about \$2,000 more than the mortgage debt. Prior to the foreclosure of the mortgage a judgment was rendered in the Hancock Circuit Court in favor of Elizabeth Strickler against appellant, the heirs of Amos Strickler and the administrator, setting aside her election to take under the law rather than by the provisions of her husband's will. In these suits appellee was Elizabeth Strickler's attorney. These judgments are still in force. Elizabeth Strickler, under the terms of the deed, continued to live with appellant until in June, 1901, when, without any good and sufficient cause for so doing, she left, and has ever since remained away. The acts done by appellee of which complaint seems to be made are acts done by him as attorney for Elizabeth Strickler, and it is averred in many different ways that these acts were done maliciously and without probable cause and that they were intended to and did vex, harass and injure appellant in her person and property.

The complaint does not state a cause of action for malicious prosecution. It is well settled that in an action for

malicious prosecution the pleading and proof must

1. show that the prosecution was malicious, was without probable cause, and that it has terminated favorably to the present plaintiff.

An action as for tort will lie where a criminal proceeding has been instituted without probable cause, and the motive in instituting it was malicious, and the prose-

2. cution has terminated in the acquittal or discharge of the accused. But the authorities are not agreed as to what cases are within the rule that an action may be maintained for the malicious institution of a civil suit. In some jurisdictions it is held that, if the person be not arrested or his property seized, the plaintiff is sufficiently punished by the payment of costs. See Cooley, Torts (2d ed.), 217, and cases cited. But it is held in this State that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless civil action. *McCardle v. McGinley* (1882), 86 Ind. 538, 44 Am. Rep. 343. In *Lockenour v. Sides* (1887), 57 Ind. 360, 26 Am. Rep. 58, the court quoted with approval from *Closson v. Staples* (1869), 42 Vt. 209, 1 Am. Rep. 316, the following: "We are of opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defense of that original suit, in excess of the taxable costs obtained by him; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only." See *Brand v. Hinchman* (1888), 68 Mich. 590, 36 N. W. 664, 13 Am. St. 362; *Pope v. Pollock* (1889), 46 Ohio St. 367, 21 N. E. 356, 4 L. R. A. 255, 15 Am. St. 608; *McPherson v. Runyon* (1889), 41 Minn. 524, 43 N. W. 392, 16 Am. St. 727; *Antcliff v. June*

(1890), 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. 533; *Fortman v. Rottier* (1858), 8 Ohio St. 548, 72 Am. Dec. 606.

The same circumstances must concur, whether the proceeding is civil or criminal; that is, the proceeding must have been instituted with malice, without probable

3. cause, and must have terminated in favor of the present complaining party. *McCardle v. McGinley*, *supra*; *Lockenour v. Sides*, *supra*; *Newell*, Malicious Prosecution, p. 39; *Stewart v. Sonneborn* (1878), 98 U. S. 187, 25 L. Ed. 116. The two actions mentioned in the complaint as having been prosecuted against appellant are shown to have been successfully prosecuted. Appellant was unsuccessful in each. The complaint not only does not contain the necessary averment that the actions terminated favorably to the party plaintiff, but expressly shows that they terminated against her. See *McCullough v. Rice* (1877), 59 Ind. 580; *Steel v. Williams* (1862), 18 Ind. 161; *Hays v. Blizzard* (1868), 30 Ind. 457; *Gorrell v. Snow* (1869), 31 Ind. 215; *Adams v. Bicknell* (1890), 126 Ind. 210, 22 Am. St. 576; *Stark v. Bindley* (1899), 152 Ind. 182; *Indiana Bicycle Co. v. Willis* (1897), 18 Ind. App. 525; *Blucher v. Zonker* (1898), 19 Ind. App. 615; *O'Brien v. Barry* (1871), 106 Mass. 300, 8 Am. Rep. 329; *Docter v. Riedel* (1897), 96 Wis. 158, 71 N. W. 119, 37 L. R. A. 580, 65 Am. St. 40.

It is claimed also that the complaint states a cause of action for malicious abuse of process. "If process, either civil or criminal, is wilfully made use of for a purpose

4. pose not justified by the law, this is abuse for which an action will lie. * * * It is enough that the process was wilfully abused to accomplish some unlawful purpose." *Cooley*, Torts (2d ed.), 220, 221. It does not appear that any unlawful purpose was accomplished, or was sought to be accomplished, in either of the actions mentioned in the complaint, or that the

process was used to accomplish anything wrongful or illegal. In one case the widow was successful in having her election set aside, and in the other the process was used to collect a valid debt. It does not appear that the plaintiff in these actions did anything or procured anything beyond what was strictly within her rights; neither does it appear that any unlawful end was accomplished; nor that appellant was compelled to do anything which she could not legally be required to do, nor that anything was done under the process not warranted by its terms, nor that anything was done in excess of what was warranted. *Nix v. Goodhill* (1895), 95 Iowa 282, 63 N. W. 701, 58 Am. St. 434; *Bartlett v. Christhilf* (1888), 69 Md. 219, 14 Atl. 518; *Roby v. Labuzan* (1852), 21 Ala. 60, 56 Am. Dec. 237; *Bradshaw v. Frazier* (1901), 113 Iowa 579, 85 N. W. 752, 55 L. R. A. 258, 86 Am. St. 394 and note page 397; *Grainger v. Hill* (1838), 4 Bing. N. C. 212.

It is true it is averred that appellee maliciously caused the process to be issued. As already stated, the things that were done were in their essence lawful. This being

5. true, the fact that such things were done with malicious motives would not make them wrongful. "Any transaction," said Black, J., in *Jenkins v. Fowler* (1855), 24 Pa. St. 308, "which would be lawful and proper if the parties were friends, can not be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart." See *Cooley*, Torts (2d ed.), 230; *Chipley v. Atkinson* (1887), 23 Fla. 206, 1 South. 934, 11 Am. St. 367; *Raycroft v. Tayntor* (1896), 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. 882; *Phelps v. Nowlen* (1878), 72 N. Y. 39, 28 Am. Rep. 93; *Docter v. Riedel*, *supra*; *Chambers v. Baldwin* (1891), 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. 165; *Bourlier Bros. v. Macauley* (1891), 91 Ky. 135, 15 S. W. 60, 11

L. R. A. 550, 34 Am. St. 171; *Guethler v. Altman* (1901), 26 Ind. App. 587, 84 Am. St. 313.

The complaint does not state a cause of action for deceit. The pleading does not show that appellee practiced any deceit against appellant, but that the deceit he is

6. charged with having practiced was against Elizabeth Strickler. Whether Elizabeth Strickler has any cause to complain of appellee's conduct as her attorney is not presented in this case. It is not alleged that appellee made any false or fraudulent representations to Elizabeth Strickler with the intent that appellant should act upon such representations, and that she did act upon

7. them. If a party to an action is injured in his person or property by the deceit or collusion of his attorney, he has a right of action by statute. §984 Burns 1901, §972 R. S. 1881. But the facts pleaded do not make a case under this statute. See *Cooley, Torts* (2d ed.), 577; *Wells v. Cook* (1865), 16 Ohio St. 67, 88 Am. Dec. 436 and note.

Judgment affirmed.

MULLEN v. CLIFFORD ET AL.

[No. 5,565. Filed March 8, 1906.]

1. **MUNICIPAL CORPORATIONS.—Street Assessments.—Liens on Back-Lying Lots.—Statutes.**—Under §4290 Burns 1901, Acts 1889, p. 237, §3, a lien for street improvements is given on the back-lying lots, distant not exceeding 150 feet from the improved street, and the assessment on the front lot conditionally attaches, without additional assessment, to such back-lying lots for any sums not paid by the sale of, or the owner of, the front lot. p. 437.
2. **DEEDS.—Covenants.—Street Assessments.**—It is not necessary to insert in a warranty deed for a lot a provision that the grantee shall pay subsequent street assessments, since he is liable therefor without such provision. p. 437.

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3. **DEEDS.**—*Covenants.*—*Liens.*—*Assumption of Payment of.—Evidence.*—Where the grantor warranted to the grantee a certain lot "subject to assessments for street improvements after 1901," and the evidence of the intention of the parties was conflicting, the court was authorized to find that the grantee was to pay instalments for street assessments falling due after 1901. p. 438.

From Superior Court of Madison County; *Henry C. Ryan*, Judge.

Action by John Mullen against Elmer Clifford and wife. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Ellison & Ellis, for appellant.

Byron McMahon and *John C. Teegarden*, for appellees.

ROBINSON, J.—Action by appellant for breach of covenant of warranty. On January 6, 1902, appellees conveyed to appellant, by deed of general warranty, lot 116 in Evalyn addition to the city of Anderson. The deed was in the ordinary form, except the provision: "Subject to assessments for street improvement after 1901." Prior to that time the city had improved Locust street and assessed lot 114, which lies lengthwise on the street, and adjacent to this lot and within 150 feet of the street are lots 115 and 116. The assessment against 114 was \$195, which the owner, having signed the waiver, was given the privilege of paying in instalments, the first instalment being payable in 1895 and the last in 1904. On May 2, 1901, the holder of Locust street improvement bonds brought suit to foreclose the lien of the assessment against lot 114 and other lots, and a decree was rendered July 28, 1902, and the lots subsequently sold under the decree, appellant purchasing the same, paying \$100 for lot 114, \$110 for lot 115, and \$108.97 for lot 116. Appellees were parties to this suit. Appellant was not. Among the defendants in that action was the holder of Second street improvement bonds, who filed a cross-complaint asking to foreclose a lien against

lot 114 and other lots—Second street running in front of lots 114, 115 and 116. In the decree the lien of this cross-complainant was foreclosed against lot 114. The last of the ten instalments for the Locust street improvement would have become due and payable in 1904, in the sum of \$20.67, the ninth instalment due in 1903, in the sum of \$21.84, and the eighth instalment in 1902, in the sum of \$23.01. The amount paid by the sheriff to the city treasurer in satisfaction of the assessment against lot 114 was \$226.46, which was the net proceeds from the sale of lots 114, 115 and 116. At the time of the foreclosure and sale none of the instalments of the assessment against lot 114 had been paid except the first one, due in 1895, in the sum of \$31.20.

The act under which the street was improved (§4290 Burns 1901, Acts 1889, p. 237, §3) fixes a lien for any unpaid balance upon property secondarily liable.

1. If lot 114 was insufficient to satisfy the assessment, it did not require any separate assessment to fix a lien for the unpaid balance upon adjacent lots lying within the statutory limit. *Cleveland, etc., R. Co. v. Edward C. Jones Co.* (1898), 20 Ind. App. 87. That is, when the deed was made by appellees, the assessment had been made and the lien existed, conditionally, against lot 116. The amount appellant claims he was compelled to pay was not an assessment made after the execution of the deed, but it was the amount of certain instalments of an assessment made before the deed was executed. Certain of these instalments became due after the deed was executed.

It would not have been necessary for the parties to insert in the deed a provision that the grantee should pay assessments for street improvements made after the

2. execution of the deed. And the fact that the deed was made on January 6, 1902, must be considered, along with all the other facts and circumstances, in determining whether the parties intended that the grantee

should pay only such assessments for street improvements as were made after 1901, or such assessments for street improvements already made that might become due and payable after 1901. When the deed was made, the assessment, and when and how the same was to be paid, were matters of record. Three of the instalments would not become due until after the date of the deed. Appellant testified in answer to the question whether he knew at the time he purchased "that there were some street assessments against the lots that were unpaid." "Yes; there were three on Second street." He further testified: "The representation to me that that was all there was to pay;" that he went to the treasurer's office to see; that he did not look for any assessment for the improvement of Locust street; his understanding was that the lot was clear. The vendor was to furnish an abstract, but he did not exact it.

The evidence shows that when the deed was made all the instalments of the assessment for the improvement of Second street had been paid but three, and appellant testi-

3. fied that the representations to him were that these were all there were to pay. The court was authorized to conclude from all the evidence that the parties intended by the deed that appellant was to pay instalments for street assessments after 1901. Lot 116 was not secondarily liable for the Second street improvement, but was secondarily liable for the Locust street improvement. If lots 114 and 115 did not sell for an amount sufficient to pay for the improvement of Locust street, then lot 116 became liable. Under the evidence and the construction the court was authorized to place upon the clause in the deed, we think it can be said that the court was authorized in finding that there had been no breach of the covenant in the deed.

Judgment affirmed.

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AMERICAN WINDOW GLASS COMPANY v. INDIANA
NATURAL GAS & OIL COMPANY ET AL.

[No. 5,488. Filed March 9, 1906.]

1. LANDLORD AND TENANT.—*Leases.—Contracts.—Gas and Oil.*—Where the lessor granted to his lessee the right to the gas and oil under his lands “for a term of twelve years and so long thereafter as petroleum, gas or mineral substances can be procured in paying quantities, or the payments hereinafter provided for are made according to the terms and conditions attaching thereto,” such lessee has twelve years in which to develop such land, provided the annual payments are made, at the end of which time, if the lands remain undeveloped, the lease terminates by its own terms. p. 443.
2. SAME.—*Leases.—Gas and Oil.—Accepting Rentals.—Election.*—Where a lease gives the lessee twelve years in which to develop the gas and oil under the lessor’s lands, certain rentals to be paid annually therefor, the acceptance of the fourteenth annual rental does not alone extend such lease for another term of twelve years, but it gives the lessee the right to reasonable notice for the development of such lands before the lessor can terminate such lease, such acceptance being an election not to claim a termination of such lease at the end of the twelfth year. p. 444.
3. SAME.—*Leases.—Termination.—Reasonable Notice of.—Question for Court or Jury.*—What is a reasonable time for the lessor in a gas-and-oil lease to give his lessee in which to develop the lands is usually a question of fact for the jury, but where the facts are undisputed and the motives of the parties do not enter into consideration, the question is one of law for the court. p. 445.
4. SAME.—*Leases.—Termination.—Reasonable Time.—What Is.*—A reasonable time to give the lessee to develop gas and oil on the lessor’s lands is such “time that preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer.” p. 446.
5. SAME.—*Leases.—Gas and Oil.—Rentals.—Payment.*—The payment of the fourteenth annual rental as provided in the lease of plaintiff’s oil-and-gas rights, secures to the lessee, during such year, the right to develop such gas or oil; and the lessor cannot, during such year, terminate such lease. p. 446.
6. SAME.—*Leases.—Termination.—Leasing to Others.*—Where the lessor in a gas-and-oil lease gave the lessee twelve years within which to develop the lands, but accepted the fourteenth

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annual payment of rent, he can not, by leasing such lands to others, terminate lessee's lease during the time covered by such payment, no reasonable notice to develop such lands having been given. p. 447.

7. LANDLORD AND TENANT.—*Leases.—Termination by Lessor.—Delay Thereafter by Lessee.*—Delay in the prosecution of the prescribed work, after the lessor had declared a forfeiture of the lease, can not be considered against such lessee in an action to enforce such forfeiture. p. 448.
8. NOTICE.—*Public Records.*—Lessees must take notice of recorded leases and their assignments. p. 448.
9. SAME.—*Landlord and Tenant.—Prior Leases.—Subsequent Lessees.*—Subsequent lessees, with knowledge of existing prior leases, take subject thereto. p. 448.

From Wells Circuit Court; *Edwin C. Vaughn*, Judge.

Suit by American Window Glass Company against the Indiana Natural Gas & Oil Company and others. From a decree for defendants, plaintiff appeals. *Affirmed.*

Carroll & Dean, Dailey, Simmons & Dailey and Cantwell & Simmons, for appellant.

W. O. Johnson, W. H. Eichhorn, Miller, Elam & Fesler and Blacklidge, Shirley & Wolf, for appellees.

MYERS, J.—The parties to this action are each claiming to be the owners of the natural gas, oil and other mineral substances underlying certain real estate in Grant county, Indiana, with the exclusive right to enter upon, prospect and remove such mineral substances therefrom, such ownership being based upon certain contracts or leases executed by the landowners, and not otherwise.

The claim of appellee Indiana Natural Gas & Oil Company is founded upon four separate leases, two executed April 5, and two March 12, 1888, by the then landowner, James S. Wilson, to Leonard H. Best, and by virtue of various written assignments of these leases thereafter made, on July 1, 1890, said appellee became vested with all the rights of the original lessee. These leases and assignments were all duly recorded prior to the execution of the leases

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under which appellant claims the ownership of said gas, oil, etc. The leases to appellant, two in number, were executed on April 15 and June 18, 1901, by Frank Wilson, Louie Wilson, his wife, and Frank Wilson, guardian of Wade H. Wilson, grantees of James S. Wilson. All of said leases, so far as they affect the question here for decision, are practically of the same tenor.

The overruling of appellant's motion for a new trial is assigned as error. The reasons assigned for a new trial are: (1) The decision of the court is not sustained by sufficient evidence; (2) the decision of the court is contrary to law. Under this assignment appellant insists that at the time of the execution of the leases to it the leases by James S. Wilson to Best were without force and effect and no longer enforceable against the property owner. If this be true, the judgment must be reversed. Therefore the determination of said appellee's claim to the oil and gas will be decisive of this controversy. The leases under which it claims contain the following stipulations:

"For the purpose and with the exclusive right of drilling, mining and operating for petroleum, gas or any mineral substance on said land, and appropriating said products so obtained to his own use and benefit, except as hereinafter provided, and removing the same from said land for the term of twelve years and so long thereafter as petroleum, gas or mineral substances can be procured in paying quantities or the payments hereinafter provided for are made according to the terms and conditions attaching thereto, * * * and the right to erect * * * machinery, tanks, pipe-lines and other property necessary for the prosecution of said business, and a right of way over, * * * and, should gas alone be found in sufficient quantities and under circumstances making it profitable to pipe the same to other localities, said party of the second part shall pay to said party of the first part \$100 per annum for the gas from each well, when so utilized, and sufficient gas to heat and light the dwelling on said premises, said payment to be accepted by

said party of the first part as full consideration and in lieu of any other royalty, * * * to commence operations for said drilling and mining purposes within one year from the execution of this lease, or in lieu thereof for delay in commencing such operations and as a consideration for the agreements herein contained, thereafter to pay * * * \$36 per annum, payable in advance each year until such operations are commenced and a well completed. A deposit to the credit of the party of the first part in the Marion Bank of Marion, Indiana, shall be considered a payment under the terms of this lease."

The undisputed facts in this case, other than those shown by the leases and as heretofore stated, are that on February 1, 1893, Frank and Louie Wilson and Wade H. Wilson, by conveyance from James S. Wilson, became the owners of the land described in the complaint. All rentals for the delay in developing the lands, until February, March and April, 1901, were duly paid and accepted by the landowners. The rentals for the years 1901 and 1902, ending February, March and April, 1903, were by said appellee deposited in the Marion Bank of Marion, Indiana. The landowners had not personally, nor had any one on their behalf, notified the bank not to receive such rentals. The rental for the year ending in 1901 was paid in February or March, 1900, by a representative of said appellee to said Frank Wilson. The landowners, after said last payment, did not receive any payment from said appellee or from said bank. Said appellee did not, nor did its assignors or any other person on its behalf, ever take possession of the real estate for any purpose prior to May 1, 1902. On said last date said appellee, by its agents and servants, entered upon said real estate, over the objections and orders of such landowners, and constructed derricks, and continued its operations thereon until it had constructed five gas-wells, and was about to commence piping the gas therefrom, when appellant applied for and obtained a temporary restraining order against appellee company, restraining it from piping

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or removing any gas or oil from said wells. Appellant has complied with all the terms and conditions of the leases under which it is claiming the right to such gas and oil.

Upon final hearing the restraining order theretofore issued was dissolved and a finding and judgment entered for said appellee. It will be noticed that the leases under which said appellee is claiming gave to it certain expressed rights

“for a term of twelve years and so long thereafter

1. as petroleum, gas or mineral substances can be procured in paying quantities, or the payments hereinafter provided for are made according to the terms and conditions attaching thereto.” This language is said to be ambiguous and uncertain as to meaning. This is true, but the ambiguity is caused by the use of the word “or” instead of “and,” thereby subjoining the stipulation, “the payments hereinafter,” etc., as an alternative. This was not the intention of the parties. It would be unreasonable to suppose that in one breath they would be so careful in fixing the time when the leases were to expire and in the next undo it all by stipulating for a nominal annual payment to run indefinitely. The twelve-year clause was incorporated into the leases for a purpose, and it is the duty of the court so to construe the contracts as to give them effect, if it can be done consistently with the rules of law, to the end, that the intention and purpose of the parties may be effectuated. To our minds, the language of the leases last above quoted evidences an intention on the part of the lessor to grant to lessee the exclusive right for the term of twelve years to operate upon said land for petroleum, gas, etc., or the right to delay such operation for such term by paying a certain stipulated annual sum as compensation for such delay; but, in case lessee should in the meantime explore such land and procure the granted product in paying quantities, while this condition existed, the lease would continue, although it may go beyond the limit of the twelve-year period. The evident intention of the landowner was to have

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his land developed, and the lessee by the twelve-year stipulation in the leases is given an agreed fixed time within which to develop the land and provide a way of utilizing the mineral substances thus obtained. Therefore had the landowners, at the end of the twelve-year term, notified said appellee that they would not receive any further payments, and refused to accept the same, and before payment to the bank given it notice not to receive any payments for their use and benefit on account of these leases, the rights of said appellee under the leases would have terminated. *American Window Glass Co. v. Williams* (1903), 30 Ind. App. 685; *Indiana, etc., Oil Co. v. Grainger* (1904), 33 Ind. App. 559; *Western Pa. Gas Co. v. George* (1894), 161 Pa. St. 47, 28 Atl. 1004; *Cassell v. Crothers* (1899), 193 Pa. St. 359, 44 Atl. 446; *Murdock-West Co. v. Logan* (1904), 69 Ohio St. 514, 69 N. E. 984; *Brown v. Fowler* (1902), 65 Ohio St. 507, 63 N. E. 76; *Northwestern, etc., Gas Co. v. City of Tiffin* (1899), 59 Ohio St. 420, 54 N. E. 77; *Bettman v. Harness* (1896), 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

The facts here show that the property owners accepted from said appellee the thirteenth advance annual payment in the same amount and for the same purpose as thereto-

2. fore paid by said appellee under its leases; that they acknowledged such payment by executing a receipt therefor, which receipt includes the statement, "which payment continues said lease in force for another term." In our opinion this transaction alone would not be sufficient to extend such leases for an additional term of twelve years, but it is sufficient to constitute a waiver by the landowners of the definite time of termination therein fixed. It was therefore a waiver of their right to claim a forfeiture of the leases at the end of the twelve-year period, and effective to require notice to the lessee and a reasonable time thereafter to comply with the terms of the lease before forfeiture.

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There is no claim of fraud or bad faith anywhere in this deal, whereby the landowners were overreached or induced to grant such waiver. It must be presumed that they accepted the thirteenth payment with full knowledge of all the facts, as well as its legal effect. They were at liberty to insist upon a termination of the leases according to their terms or to waive such stipulations. For a valuable consideration they chose the latter. By their own voluntary choosing they must be content. Therefore to give the transaction the force we have ascribed to it does not take away from the landowners the right to declare a forfeiture of such leases; but before they would be entitled to such forfeiture, under the decisions of our Supreme Court applicable to this special class of contracts, they must give said appellee a reasonable time in which to develop the lands after notice of such intention. *Consumers Gas Trust Co. v. Littler* (1904), 162 Ind. 320; *Consumers Gas Trust Co. v. Worth* (1904), 163 Ind. 141; *Consumers Gas Trust Co. v. Ink* (1904), 163 Ind. 174; *LaFayette Gas Co. v. Kelsay* (1905), 164 Ind. 563; *Indiana, etc., Oil Co. v. Beales* (1906), 166 Ind. 684.

In this class of cases a reasonable time, as a rule, is a question of fact and not one of law; for its determination largely depends upon the circumstances surrounding the

3. particular case and the means and ability of the person by whom the contract is to be performed. See *Consumers Gas Trust Co. v. Littler, supra*; *Island Coal Co. v. Combs* (1899), 152 Ind. 379, 387; *Randolph v. Frick* (1894), 57 Mo. App. 400. Where the facts are undisputed or admitted, or are clearly established, "reasonable time" has been held to be a question of law; but should the question of reasonable time depend upon any controverted facts, or "where the motives of the party enter into the question, the whole is necessary to be submitted to a jury before any judgment can be formed as to whether the time was or was not reasonable." 7 Words and Phrases, 5977.

In *Scannell v. American Soda Fountain Co.* (1901), 161 Mo. 606, 61 S. W. 889, reasonable time is defined to be such "time that preserves to each party the rights
4. and advantages he possesses, and protects each party from losses that he ought not to suffer." To the same effect is the language of the court in *Bowen v. Detroit City R. Co.* (1884), 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822. The court in *Cameron v. Wells* (1858), 30 Vt. 633, quotes from *Graham v. Van Diemen's Land Co.* (1855), 11 Exch. 101: "Reasonable time will not begin to run until someone interested in the matter takes some step in respect of it."

The only landowner who testified in this case was Frank Wilson. In this matter he seems to have been acting not only for himself, but also for his wife, and as
5. guardian of Wade H. Wilson. He received from Mr. Branch, representing said appellee, what is termed "land rentals" for the year ending in 1901. Branch died prior to the trial of this cause. From the testimony of Wilson it appears that in February or March, 1900, and at the time he received such rentals, Branch told him they were "going to operate the lease next year, making preparations." The witness was then asked the following question: "I will ask you if you did not state to him, in that connection, that unless they did operate that lease that you would not permit them to hold it any longer? A. Yes, sir." This seems to be all that occurred between the parties at the time the payments were made in 1900 with reference to when operations on these lands were to commence. Whether the parties considered this conversation as referring to the calendar year 1901 or the year for which said appellee was making payment, would make but little difference, as said appellee, without any notice from the landowners that they would not receive any more payments, paid to the bank, as provided in the leases, the fourteenth annual payment when it became due. Such payment, be-

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ing accepted by the bank for the use of the Wilsons, and without notice from them not to do so, in a legal sense constituted a payment to the Wilsons, and by reason thereof extended the leases until 1902. *LaFayette Gas Co. v. Kelsay, supra*; *Indiana, etc., Oil Co. v. Beals, supra*. But aside from the payments made to the bank nothing further was said or done by either of the parties until about the time the payments for the fourteenth year became due, which was in February and March, 1901. Some time in the latter part of January, 1901, a representative of appellant called upon Wilson, relative to leasing the same lands covered by the leases of appellee Indiana Natural Gas & Oil Company, and was told by Wilson that he would not do anything about leasing the land until he had heard from the Chicago parties, meaning said appellee. But we find no evidence in the record where the matter was taken up with said appellee, nor do we find any evidence showing any further notice to said appellee of intention to terminate the leases, nor do we find any evidence of notice to the bank not to receive such rentals, although Wilson acknowledged having received notice from the bank that it had received the same for his account. The first positive steps taken by the Wilsons to forfeit the leases, as

6. shown by the evidence, was when they leased the land to appellant. As we have said, these latter leases were made in April and June, 1901. Under this state of facts we can not say, as a matter of law, that said appellee was called upon to do anything toward developing the lands prior to the attempted forfeiture in April and June. The testimony of Wilson covers fifty typewritten pages of record, and, from a careful examination of his testimony, we think its weight and the inferences to be drawn therefrom are matters for the trial court, and its conclusion upon the questions of notice to said appellee, and as to reasonable time in which to develop the territory were questions of fact, and the court's finding thereon ought not to be disturbed on appeal.

Any delay by said appellee in the beginning or prosecution of the work, after the execution of the leases

7. to appellant, has no bearing upon the decision of this case. *Consumers Gas Trust Co. v. Ink, supra.*

Appellant confidently relies upon the case of *Bettman v. Harness, supra*, for a reversal of the judgment in the case at bar. We admit the case is exceedingly persuasive of appellant's views; but under the construction given this class of contracts, and the law, as declared by our Supreme Court on the question of reasonable time to lessees, the case of *Bettman v. Harness, supra*, on the question of the extension of leases is not applicable. Therefore, if this appeal was prosecuted by the landowners, the judgment should be affirmed.

The remaining question in the case depends upon whether appellant had knowledge of said appellee's rights at the time it accepted the leases under which it is claim-

8. ing. Of the recorded leases and their assignments it was bound to take notice. The evidence is undisputed that it knew of the payments and extension of the leases for the additional period of one year. It

9. knew that pending its negotiation for the leases, and at the time it received the same, said appellee had deposited in the Marion Bank money for the use of the landowners, in an amount sufficient, under the stipulations of its leases, to cover a period ending in 1902.

From these facts, and other evidence in the record, the trial court was authorized in finding that appellant had knowledge of said appellee's leases, and was claiming the gas and oil privileges covered by them. Therefore, upon this feature of the case we are inclined to the opinion that appellant occupied no better position than its lessors, for the reason that it can not be regarded as a *bona fide* lessee for value without notice.

Judgment affirmed.

WILLIAMS, ADMINISTRATOR, v. DOUGHERTY.

[No. 5,847. Filed March 13, 1906.]

1. **APPEAL AND ERROR.**—*Assignment of Errors.*—*Names.*—An assignment of errors entitled: "Henry Williams, Administrator of the Estate of Adam S. Dougherty, Deceased, Appellant v. Mary J. Dougherty, Appellee," is sufficient, in the absence of a showing that there were other parties to the judgment. p. 450.
2. **SAME.**—*Judgment.*—*Personal.*—*Appeal in Representative Capacity.*—Where the complaint in the caption names defendant in his personal capacity but in the body seeks to remove him from his representative capacity, and some other pleadings name him individually and some in a representative character, and the judgment removes him from his representative capacity, an appeal by him in his representative capacity is properly taken. p. 450.
3. **SAME.**—*Assignment of Errors.*—*Want of Prayer for Relief.*—The want of a prayer for relief is not fatal to an assignment of errors otherwise sufficient. p. 451.

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Action by Mary J. Dougherty against Henry Williams, as administrator of the estate of Adam S. Dougherty, deceased. From a judgment for plaintiff, defendant appeals. On motion to dismiss appeal. *Motion denied.* (For decision on merits, see 38 Ind. App. —.)

William Featherngill, for appellant.

C. B. Clarke, *W. C. Clarke* and *Deupree & Slack*, for appellee.

COMSTOCK, J.—Appellee filed her complaint in the Johnson Circuit Court asking that letters of administration issued in vacation by the clerk of said court to the appellant, on the estate of Adam S. Dougherty, deceased, and confirmed by said court in term, be set aside and declared null and void, and that the judgment of the court confirming said letters be vacated. Issues were joined by general denial. Upon a hearing of the cause judgment was rendered in favor of appellee as prayed for in the complaint.

Appellee moves to dismiss the appeal upon the grounds: (1) That the assignment of errors does not contain the full names of all the parties to the cause appealed; (2) that it shows an appeal to this court made by Henry Williams, administrator of the estate of Adam S. Dougherty, deceased, but said Henry Williams, administrator of the estate of Adam S. Dougherty, deceased, was not a party to said cause now appealed to this court; (3) that the assignment is not made by Henry Williams, the party against whom the judgment in the court below was rendered, from which judgment an appeal was prayed; (4) it does not contain any prayer for relief.

These grounds in their order: First: The assignment of errors entitled "Henry Williams, administrator of the estate of Adam S. Dougherty, deceased, appellant,

1. v. Mary J. Dougherty, appellee." This gives the full names, within the rule, of the only parties to the suit. Counsel do not, in the motion or in the brief in support thereof, attempt to show that there are other parties.

The second and third reasons for dismissal may be considered together. The complaint was filed February 28, 1905, and was entitled "Mary J. Dougherty v.

2. Henry Williams." It alleges the application for letters testamentary and the appointment of Henry Williams as administrator of the estate of Adam S. Dougherty, her late husband, and asks that the appointment be revoked. Subsequently divers motions were made by Henry Williams, administrator—one to require the plaintiff to verify her petition, one to strike out an exhibit filed with the petition, one to dismiss the plaintiff's petition, and one to require plaintiff to make her petition more specific. A demurrer to the complaint, an answer to the complaint and a demurrer to the second paragraph of answer were each filed and overruled. These motions and de-

murrers and answers are numbered 596. The motion to verify the petition is filed under the title of "Henry Williams, administrator of the estate of Adam S. Dougherty;" the motion to strike out, "Mary J. Dougherty v. Henry Williams;" and the motions to dismiss and to make more specific are entitled "In the matter of the estate of Adam S. Dougherty." The complaint, said motions, demurrers and answers show that the appellant was sued in his representative capacity. The judgment is in the following language: "It is therefore ordered, adjudged and decreed by the court that said judgment of the appointment of said Henry Williams, administrator of the estate of Adam S. Dougherty, deceased, and the issuance of letters to him of administration on said estate, are void and of no effect in that said Johnson Circuit Court had no jurisdiction so to do, and it is further adjudged by the court that said judgment and appointment as aforesaid and that the issuance of letters as aforesaid to said estate are held for naught." It is from this judgment the appeal is taken. "It is the character of the suit that determines this right [of appeal]; and that does not depend on the mere naming the party as executor or administrator in the process or declaration, but upon the cause of action as developed in the pleadings, and whether the recovery is sought in a representative or individual capacity." *Pugh v. Ottenkirk* (1842), 3 Watts & S. 170. The judgment removing the administrator did not deprive him of his right of appeal. *Case v. Nelson* (1899), 22 Ind. App. 22.

Our attention has not been called to any authority in support of the remaining reason: "The assignment of errors does not contain any prayer for relief," the

3. assignment of errors is the complaint in the appellate tribunal. It is only necessary that it should be so formed that issue can be joined upon it. The assignment of errors before us gives the title of the action, and immediately following proceeds: "The appellant says there

is manifest error in the proceedings and judgment in this cause, in this." Then follows a statement of the specifications of error. This is sufficient.

Motion to dismiss overruled.

OVER *v.* BYRAM FOUNDRY COMPANY.

[No. 5,592. Filed March 13, 1906.]

1. **CONTRACTS.** — *Sales.* — *Enforcement.* — A contract fixing the price and terms of a sale of sash weights governs the amount of recovery therefor unless there is some exception taking the case out of the general rule. p. 455.
2. **SAME.** — *Manufacture of Goods.* — *Breach.* — Where plaintiff contracted to sell to defendant all the sash weights it should make during the period of such contract reserving the "right to discontinue the making" thereof any time during such period, its exercise of such right of discontinuance was not a breach of such contract. p. 455.
3. **SAME.** — *Restraint of Trade.* — *Monopolies.* — *Statutes.* — A contract by which plaintiff agrees to sell all of the sash weights it should make during the "remainder of the year" to defendant, a manufacturer of sash weights, is not void as being in violation of §3312g Burns 1901, Acts 1897, p. 159, §1, providing that all contracts, by persons who "control the output of said article of merchandise," made to prevent competition "in the importation or sale of articles imported into this State," shall be void. p. 455.
4. **SAME.** — *Monopolies.* — *Common Law.* — *Test.* — A contract by which plaintiff agreed to sell all of the sash weights it should make during "the remainder of the year" to defendant, also a manufacturer of sash weights, is not void at the common law as monopolistic, the test being whether such contract is inimical to public interest. p. 457.
5. **SAME.** — *Corporations.* — *Ultra Vires.* — *Public Duty.* — A manufacturing corporation may lawfully contract its output for a limited time to one person. p. 458.

From Superior Court of Marion County (63,389);
Vinson Carter, Judge.

Over v. Byram Foundry Co.—37 Ind. App. 452.

Action by the Byram Foundry Company against Ewald Over. From a judgment for plaintiff, defendant appeals. *Reversed.*

Newton M. Taylor, for appellant.

Charles E. Averill, for appellee.

ROBY, C. J.—Action for goods sold and delivered by appellee to appellant, at his special request. A bill of particulars was filed with the complaint. Appellant answered by denial and plea of payment. Appellant filed a counterclaim in four paragraphs, all of which were founded upon an alleged breach of a written contract filed therewith. Demurrers to the counterclaim were overruled, and appellee answered in general denial, and specially in a second paragraph setting up the invalidity of the contract counted upon as being in restraint of trade. A demurrer to this paragraph of answer was overruled and a reply in denial filed. The issues were submitted to the court for trial. Finding and judgment for appellee in the sum of \$168.75.

The grounds for a new trial stated in appellant's motion are that the decision is not sustained by sufficient evidence, that it is contrary to law, that the court erred in excluding evidence, in support of the complaint, as to the amount of weights made by appellee, and in admitting testimony as to the sale and delivery of weights to appellant, it appearing that such articles were sold in pursuance of the written contract between the parties. The error assigned is in the overruling of the motion for a new trial. •

It was developed by interrogatories submitted to appellee, and is established by all the relevant evidence, that the goods, on account of which the appellee sues, were sold and delivered by it to the appellant under and in accordance with a written contract between them of the following tenor:

“Articles of agreement entered into at Indianapolis, Indiana, this 27th day of March, 1901, by and between the Byram Foundry Company and Ewald Over,

all of the city of Indianapolis, Indiana, witnesseth: Said Byram Foundry Company agrees to, without unnecessary delay, mail a letter or postal withdrawing the price of seventy-five cents per hundred pounds recently made on sash weights to all parties to whom said price was made. Said Byram Foundry Company hereby agrees to make round sash weights during the remainder of this year, not to exceed five hundred tons, which amount of sash weights said Ewald Over agrees to buy of them, delivered either at the depots in this city, or to Ewald Over's place of business, or to his customers in said city; sash weights to be center hung and made in a merchantable manner and full weight as near as practicable. Said Ewald Over hereby agrees to pay said Byram Foundry Company \$16 per ton for said weights, monthly settlements in cash on or before the 10th of the month following invoice. Said Byram Foundry Company reserves the right to fill any and all contracts already made on their own account out of the said five hundred tons. Said Byram Foundry Company also reserves the right to sell sash weights at prices to be named by said Ewald Over at any time during the term of this agreement, the amount of money obtained in pay for them to be credited to said Ewald Over, and monthly statements of all sales to be made to said Ewald Over, giving names to whom sold, sizes of weights, number of pounds, and the amount of money received in payment. It is understood that the sash weights made under this contract shall be fairly assorted, and delivered in amounts of about fifty to sixty tons per month, and that said Ewald Over may suggest the sizes of such fair assortment. Said Byram Foundry Company also agrees not to make any double ender, round, square or flat weights during the term of this agreement. Said Byram Foundry Company reserves the right to discontinue the making of sash weights at any time during the term of this agreement.

"Witness our hands and seals this 27th day of March, 1901.

Ewald Over.

Byram Foundry Company.

H. G. Byram,

V. P. and Genl. Mgr."

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This contract fixes the price and terms of sale of the articles specified, and in the absence of an exception taking the case out of the general rule it can not be ignored.

1. *Everett v. Stuck* (1900), 25 Ind. App. 279; *Baltimore, etc., R. Co. v. Ragsdale* (1896), 14 Ind. App. 406; *Louisville, etc., R. Co. v. Barnes* (1896), 16 Ind. App. 312.

Appellee claims that, while a written contract was made, it was not performed by either party, and that a recovery for the reasonable value of the property accepted

2. and used by the appellant may therefore be had.

The appellee seems to have carried out the contract up to the date of the following letter:

"Indianapolis, U. S. A.

September 4, 1901.

Ewald Over,
City.

Dear Sir:

Owing to the scarcity and consequent high price of scrap, there is no money in sash weights at our contract price, therefore, as we have sufficient work to run our shop without making any weights, we will be unable to make you any further shipments during the month of September, and will have to decline your order of 30th ult.

Respectfully,

Byram Foundry Company."

The right to discontinue the making of weights at any time during the term of the contract was, by the last item thereof, given to appellee. The exercise of the right thus secured did not amount to breach of contract, but was an act in pursuance thereof, leaving the settlement for goods furnished thereunder to be made as stipulated.

It is assumed that the contract is void as against public policy as in restraint of trade. Section one of the act of 1897 (Acts 1897, p. 159, §3312g Burns 1901) de-

3. clares contracts between persons or corporations who control the output of any article of merchan-

dise void when such contracts are made with a view to lessen free competition in the importation or in the sale of imported articles, and also declares contracts between persons or corporations who control the output of "said article of merchandise" which are designed or tend to advance, reduce or control the price or cost to the producer or to the consumer of any such product or article, to be against public policy, unlawful and void.

In order that a contract be within the purview of this act, it must be made between persons or corporations "who control the output." The first two inhibitions apply to contracts made with a view to lessen free competition in the importation of articles of merchandise and in the sale of imported articles. The contract referred to must be made within the State, but the monopoly, in the legislative mind, could not have been limited to the State, since the thing guarded against has relation wholly to goods made without the State. The last two inhibitions within which the present case falls, if it is within the statute at all, are against contracts made between persons "who control the output of said article of merchandise." The output referred to in the first instance not being restricted to goods made in the State, it is questionable if a narrower meaning should be given the term when used a second time in this section.

The legislature evidently meant to limit the sole power, or power largely in excess of that possessed by others, in dealing in some particular commodity; but, assuming that the last two inhibitions apply to persons controlling the output of articles manufactured in Indiana, there is a total lack of evidence to sustain the judgment. The article is one which may be made of the commonest iron and at any foundry. The parties referred to by the act are not those who control the output of a single factory or a single town. In these days of quick communication and rapid transportation, such a construction can not for an instant be enter-

tained. The statute was directed against monopoly. The word is defined as, "The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise to the detriment of the public." No two establishments can have a monopoly of the business of manufacturing sash weights, so that the first and essential element necessary to the application of the act to the contract in question is wanting. If the act were to be construed as rendering void such a contract as the one under consideration, it would be impossible for one person to purchase the most common articles of merchandise from another, since, under the simplest principles of the law of supply and demand, every purchase "tends" to advance the price of the commodity purchased. If so applied, the section would render void a contract tending to make bread cheaper or to reduce the cost to the consumer of any other necessity of life. Such a construction would invalidate the law, and ascribe an intention to the lawmaking body which it is impossible to believe existed.

Neither is the contract void at common law. By it one party agrees to make for another during "the remainder of the year," round sash weights, not to exceed five

4. hundred tons, which amount the other party agrees to buy at a stipulated price. Each case involving the question of public policy and restraint of trade is decided upon its own facts. *Consumers Oil Co. v. Nunnemaker* (1895), 142 Ind. 560, 564, 51 Am. St. 193; *Oregon Steam Nav. Co. v. Winsor* (1873), 87 U. S. 64, 22 L. Ed. 315; *Fowle v. Park* (1889), 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; *Gibbs v. Consolidated Gas Co.* (1889), 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. 553. The test is whether the contract is inimical to the public interest. *Consumers Oil Co. v. Nunnemaker, supra.*

The appellant agreed to buy and pay for all the weights, not exceeding five hundred tons, which the appellee might

make during the remainder of the year, appellee

5. reserving the right to discontinue making them at any time. The strict rule applicable to contracts, by which persons or corporations holding franchises or rights of a *quasi* public nature attempt to evade the corresponding duty, is not applicable to a case involving the manufacturer of cast-iron window weights. The law does not permit any restraint whatever in the former class, but a contract binding the party manufacturing to sell exclusively to one person during a limited period is valid. *Trentman v. Wahrenburg* (1903), 30 Ind. App. 304; *Greenhood*, Public Policy, rule DLXI, illustrations; 24 Am. and Eng. Ency. Law (2d ed.), 854; *Moore & Handley Hardware Co. v. Towers Hardware Co.* (1886), 87 Ala. 210, 6 South. 41, 13 Am. St. 25. "Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce." *Herriman v. Menzies* (1896), 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. 82. There is no suggestion that the price fixed was unreasonable. The rights of the parties must therefore be determined by reference to the written contract. These considerations lead to a reversal of the judgment.

Other questions discussed in the brief, in view of the conclusions reached, are not relevant.

The judgment is reversed and cause remanded, with instructions to sustain appellant's motion for a new trial and for other consistent proceedings.

THOMSON v. MIDLAND PORTLAND CEMENT COMPANY ET AL.

[No. 5,591. Filed March 13, 1906.]

APPEAL AND ERROR.—Receivers.—Judgment.—Receiving Benefits of.—Dismissal of Appeal.—Attorney and Client.—Where, pending a suit for a receiver, the tangible property of a corporation was sold for enough to pay the debts of such corporation, which sale the court refused to disturb, but appointed a receiver for the intangible assets thereof, who, after the petitioner had appealed, collected money and upon the request of petitioner's attorney paid such attorney for his services in prosecuting such cause, such appeal will be dismissed, such payment being a discharge of at least a part of petitioner's indebtedness to such attorney.

From Superior Court of Marion County (67,077);
James M. Leathers, Judge.

Suit by Alexander W. Thomson against the Midland Portland Cement Company and others. From an order confirming a sale of certain property by defendant receiver, plaintiff appeals. *Appeal dismissed.*

William Bosson and *Elliott, Elliott & Littleton*, for appellant.

Smith, Duncan, Hornbrook & Smith and *Louis Newberger*, for appellees.

WILEY, J.—Appellees have interposed a motion to dismiss the appeal, on the ground "that the appellant, through his counsel, has claimed and received certain benefits arising under the decree as entered in the court below, and that, having done so, he can not now assert that there was error in the decree."

A brief statement of the facts upon which the appeal is based is important before taking up the question for decision presented by the motion. In the court below appellant sought the appointment of a receiver for all of the

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assets, both tangible and intangible, of the Midland Portland Cement Company. Pending the litigation the tangible assets of the company were sold at a price equivalent to its entire indebtedness. The court refused to disturb this sale, but did appoint a receiver for the intangible assets, which consisted of certain claims against officers, directors, and others. It is shown by the motion to dismiss that subsequently to the submission of this cause the receiver came into possession of about \$3,000 in cash, as proceeds from such intangible assets; that thereafter counsel for appellant, both in the court below and on appeal, filed his petition in the court below, showing that appellant had employed him to institute proceedings against the Midland Portland Cement Company for a receiver, etc.; that such proceedings were had that the Union Trust Company was appointed receiver of certain intangible assets of the cement company; that a reasonable fee for the services rendered in said action by said attorney would be \$1,000; that thereafter the court entered an order allowing to said attorney the sum of \$250 on account of his services in said action, and directed the receiver to pay said sum to him out of the funds in his hands. Such payment was made.

It would seem from the record, and as disclosed by the motion, that appellant does not complain of the action of the court below in appointing a receiver for the intangible assets, but he is asking a reversal of the judgment because of the action of the court in refusing to appoint a receiver for the tangible assets. Under these facts can appellant receive benefits growing out of that part of the decree which is favorable to him, and at the same time prosecute an appeal in which he seeks a reversal of that part of the decree which is unfavorable to him? If he can, then the motion is not well taken; otherwise, it must be sustained.

Section 644 Burns 1901, §632 R. S. 1881, provides: "The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon." This statutory provision has been enforced in many cases.

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In *Sterne v. Vert* (1886), 108 Ind. 232, the suit was to foreclose a mortgage covering three parcels of ground. As to two of the parcels there was no controversy, but as to the third, it was contended that the property was held by husband and wife by entireties, that the debt, to secure which the mortgage was given, was the debt of the husband, and therefore as to the third parcel of land it was invalid. The trial court held that the mortgage was valid upon two of the tracts, and invalid as to the third. Appellant proceeded to have the two tracts sold under a decree, became the purchaser himself at sheriff's sale, and appealed from that portion of the decree declaring the mortgage invalid as to the third tract. Appellees pleaded in bar the action of the appellant in proceeding under the decree to sell the other two tracts. The court said: "It thus appears that after electing to use the alleged erroneous judgment and decree of the court, in selling two tracts of land therein described, the appellant is prosecuting an appeal to this court, seeking a reversal of the decree as to the other tract. This can not be done."

In the case of *McGrew v. Grayston* (1896), 144 Ind. 165, it was held that a defendant in a partition proceeding, who has sold the premises allotted to him under the judgment, is estopped from maintaining an appeal from such judgment. In that case the court said: "The right of appeal, though conferred by statute, may be forfeited and waived in many ways. It is 'an established principle of law that a party can not prosecute an appeal and thereby seek to reverse a judgment, the benefits of which he has accepted voluntarily and knowing the facts. After such acceptance, he is estopped to reverse the judgment on error, and the same may be treated as a release of errors. * * * This rule is founded on the principle that a party in a court of justice will not be allowed to acquire advantages by assuming inconsistent positions.'" To the same effect is the case of *Sonntag v. Klee* (1897), 148 Ind. 536.

In *Williams v. Richards* (1899), 152 Ind. 528, the court said: "A party may not accept a benefit based on the legality of an adjudication and thereafter be heard to complain that it is erroneous. * * * This appeal is from the decree as an entirety. Appellants may not act upon part and resist the residue. * * * The firm's assets were taken into the custody of the court. By virtue of the court's decree the business has been carried on, and appellants, while prosecuting this appeal, have been receiving moneys under the decree divided in proportions fixed by the decree. These benefits accrued to appellants, not by the contract, but by the court's action upon their breach of the contract."

The case of *McCracken v. Cabel* (1889), 120 Ind. 266, was a proceeding to condemn land belonging to appellant, and the damages awarded to him by the jury were \$320.45. Appellees paid this sum into court. Appellant's attorneys of record filed a lien on the judgment for \$150 for their fees in obtaining the same, and collected from the clerk said sum. Subsequently an appeal was taken, and appellant moved to dismiss it. It was held that appellant was bound by the acts of his attorneys, and that by their act in the collection of their fees appellant thereby received money upon the judgment which he sought to reverse, and that, for that reason, the appeal should be dismissed.

In *Raborn v. Woods* (1904), 33 Ind. App. 171, this court held that in an ejectment proceeding, where the appellant took possession of that portion of the land awarded him, and continued to hold it, exercising acts of ownership over it, appropriating to his own use the rents and profits arising therefrom, he could not thereafter maintain an appeal. In that case appellant sought a reversal of the decree which awarded to appellees other parts of the land, and it was held that he could not accept the benefits accruing to him under the decree, and appeal from that part of it which was against him.

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In *Rariden v. Rariden* (1904), 33 Ind. App. 284, 104 Am. St. 252, it was held that after an appeal by the defendant in a divorce proceeding, whereby it was sought to reverse the decree fixing the amount of alimony, the appellant in the meantime having remarried, the appeal should be dismissed.

In *Cronkhite v. Evans-Snider-Buel Co.* (1897), 6 Kan. App. 173, 51 Pac. 295, it was held that the acts of a regularly employed attorney of record for the plaintiff, within the apparent scope of his authority, are in law the acts of the plaintiff, unless the parties with whom he deals have notice, or the files of the case show that his authority has been revoked. In that case a judgment for costs in favor of the appellant was entered, and such costs were paid immediately into court. The attorney of record receipted for a part thereof, and it was held that as appellant accepted, through his attorney, a substantial part of the benefits of the judgment, he could not afterwards successfully prosecute an appeal for reversal. See, also, *Carll v. Oakley* (1884), 97 N. Y. 633.

A client is primarily liable to his attorney for services rendered under his employment. Under the decree in this case, by virtue of the appointment of a receiver for the intangible assets of the insolvent corporation, there came into the hands of the receiver money belonging to the trust it was administering. If no funds or assets belonging to the trust had come into the hands of the receiver, appellant nevertheless would have been liable to his attorney for all services rendered. It necessarily follows that when appellant's attorney went into court and asked, was allowed and paid a sum of money as and for his fees, the payment to the extent of it discharged appellant's obligation. This brings the case within the spirit of the statute and the authorities above cited.

The appeal is dismissed.

HAMILTON NATIONAL BANK v. NYE.

[No. 5,557. Filed March 14, 1906.]

1. PLEADING.—*Answer.*—*Verification.*—*Bills and Notes.*—*Indorsements.*—*Unauthorized.*—An answer, in an action by the indorsee of a bank check, that the plaintiff derived title through an unauthorized indorsement by one claiming to be the agent of the payee, is sufficient and needs no verification. p. 465.
2. SAME.—*Facts.*—*Conclusions.*—A pleading setting out the facts is not rendered bad by surplusage consisting of the legal conclusions from such facts. p. 466.
3. BILLS AND NOTES.—*Checks.*—*Title.*—*Unauthorized Indorsement.*—The unauthorized indorsement of a bank check confers no title on the indorsee. p. 466.
4. SAME.—*Checks.*—*Title.*—*Unauthorized Indorsement.*—*Subsequent Indorsees.*—Subsequent indorsees have no title as against the drawer of a check, where the first indorsement was unauthorized. p. 466.
5. SAME.—*Negotiable.*—*Title.*—*Innocent Subsequent Indorsees.*—*Equities.*—An innocent subsequent indorsee ordinarily takes negotiable paper free from the equities between the original parties or prior indorsers. p. 467.
6. PRINCIPAL AND AGENT.—*Salesman.*—*Authority to Indorse Checks.*—An ordinary traveling salesman has no implied authority to indorse checks payable to his principal. p. 467.
7. BILLS AND NOTES.—*Checks.*—*Unauthorized Indorsement.*—*Innocent Indorsees.*—*Loss.*—The drawer of a check does not put it in the power of a third party to do a wrong, within the meaning of the law, when he draws a check to the payee and such third party without authority indorses the payee's name thereon and such check passes in due course to a subsequent indorsee. p. 468.

From Kosciusko Circuit Court; *Edgar Haymond*, Special Judge.

Action by the Hamilton National Bank against Edward E. Nye. From a judgment for defendant, plaintiff appeals. *Affirmed.*

James S. Dodge, Jr., and *Bertram Shane*, for appellant.
Samuel Parker, John H. Brubaker and *Walter Brubaker*, for appellee.

ROBINSON, J.—Action by appellant upon a bank check. The complaint avers that appellee executed his check upon the Lake City Bank, payable to “Walsh, Boyle & Co., or order,” and delivered the check to the payee; that afterward the check, for a valuable consideration, was indorsed by the payee to the Indiana National Bank, which bank, for a valuable consideration, indorsed the check to appellant; that afterward appellant presented the check to the Lake City Bank for payment, which was refused, of which fact appellee had notice; and that the same was duly protested.

Appellee filed a verified answer admitting the execution of the check, but alleges he should not be held liable on the check, for the reason that since this action was

1. commenced he paid the amount of the check to Walsh, Boyle & Co.; that at the time the check was drawn he was indebted to that firm to the amount of the check for goods sold by the firm to him, through their traveling salesman Underhill; that when the check was drawn it was delivered to Underhill, who, instead of sending it to the firm, as was his duty, took the same to the Indiana National Bank and wrote the words “Walsh, Boyle & Co.” across the back thereof, which bank forwarded the check to appellant, which was its Chicago correspondent; that the check was not indorsed by the firm, but was indorsed with the firm’s name by Underhill; that he had no authority or right so to indorse the same; and that the firm did not in any manner ratify the indorsement. It was not necessary to verify the answer. It is not a plea of *non est factum*. It does not deny the execution or delivery of the check. The effect of the answer is that it denies the appellant’s right to sue on the check for the reason that Walsh, Boyle & Co. are the real owners of the check, the title never having passed to appellant. Whether the verification that was attempted was sufficient is not material.

The facts pleaded in the answer, if true, are a bar to the action. See *Bostwick v. Bryant* (1888), 113 Ind. 448.

It is urged against the answer that it pleads appellee's conclusion as to what he "was bound to do in law." How-

ever, this conclusion neither adds anything to, nor

2. takes anything from, the pleading, because the facts from which this conclusion is drawn are pleaded. The facts pleaded speak for themselves, and it was unnecessary for appellee to state what the law upon those facts required or did not require him to do. The conclusion is surplusage.

The maker of the check did not undertake to pay the amount of the check to any person other than Walsh, Boyle & Co., or to some person to whom this firm should

3. order it to be paid. When the check was drawn and delivered to the firm's agent, the title was in the firm, and remained in the firm until by some act of the firm, or its authorized agent, it passed to another. An indorsement by any other person could have no effect on the firm's title. Placing the firm's name on the back of the check and delivering it to a third person would divest the firm's title and vest the title in such third person. If the agent, without the firm's knowledge, had delivered the check without any indorsement to a third person, such delivery could not affect the firm's title, but such an act could have no greater or less effect than the delivery of the check with an unauthorized indorsement.

If appellant has any title to the check, it derived it through the Indiana National Bank. But the unauthorized indorsement and delivery of the check had no

4. effect on the payee's title and could not therefore convey anything, as against the payee, to that bank. We have nothing to do with the respective rights of the two banks as against each other. "The purchase of the check upon a forged or unauthorized indorsement conferred no title, and in contemplation of law the check remained untransferred."

 Hamilton Nat. Bank v. Nye—37 Ind. App. 464.

Indiana Nat. Bank v. Holtsclaw (1884), 98 Ind. 85. See, also, *Graves v. American Exchange Bank* (1858), 17 N. Y. 205; *Armstrong v. National Bank* (1889), 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. 655, 6 L. R. A. 625; *Levy & Salomon v. Bank of America* (1872), 24 La. Ann. 220, 13 Am. Rep. 124; *Seventh Nat. Bank v. Cook* (1873), 73 Pa. St. 483, 13 Am. Rep. 751; *Welsh v. German American Bank* (1878), 73 N. Y. 424, 29 Am. Rep. 175; *National Park Bank v. Seaboard Bank* (1889), 114 N. Y. 28, 20 N. E. 632, 11 Am. St. 612, note; *Baldwin v. Shutter* (1882), 82 Ind. 560; *Citizens State Bank v. Adams* (1883), 91 Ind. 280; *Adams v. Citizens State Bank* (1880), 70 Ind. 89; *Elliott v. Armstrong* (1829), 2 Blackf. 198, 211.

It is quite true it is possible that a remote indorsee might acquire a better title to a negotiable instrument, so far as available equities and defenses between the parties

5. are concerned, than some prior indorser through whom the indorsee's title came. But the unauthorized indorsement had no effect on the payee's title to the check. The delivery of the check with the unauthorized indorsement was in effect the delivery of the check without any indorsement, and in the latter case it is clear that the check in the hands of any one, other than the payee, would not be negotiable paper according to the custom of merchants.

The agent Underhill was engaged in selling goods, and was probably authorized as such agent to collect money for goods sold. But he had no implied authority to

6. bind his principal by the separate, original and independent contract of indorsement. In Tiedeman, Commercial Paper, §77, the author says: "And the execution and negotiation of commercial paper are considered by the commercial world so liable to the infliction of injury on the principals, if this authority is given to agents, —the general custom being to reserve this power for per-

sonal exercise,—that the presumption of the law is more strongly opposed to an implied authority to execute and negotiate commercial paper than to do anything else.” See *Knowlton v. School City of Logansport* (1881), 75 Ind. 103; *Robinson v. Anderson* (1886), 106 Ind. 152; *Runyon v. Snell* (1888), 116 Ind. 164; *Blackwell v. Ketcham* (1876), 53 Ind. 184; *Indianapolis Mfg., etc., Union v. Cleveland, etc., R. Co.* (1873), 45 Ind. 281; *Reitz v. Martin* (1859), 12 Ind. 306, 74 Am. Dec. 215; *Miller v. Edmonston* (1846), 8 Blackf. 291; *Smith v. Gibson* (1843), 6 Blackf. 369; *Kirk v. Hiatt* (1850), 2 Ind. 322; *Corning v. Strong* (1849), 1 Ind. 329; *Graham v. United States Sav. Inst.* (1870), 46 Mo. 186.

It is a general rule, applicable in cases of agency, that where one of two innocent parties must suffer through the fraud of a third party, the loss should fall upon

7. him who put it in the power of such third person to do the wrong. But this rule is not applicable in this case, for the same reason that would prevent its application if the Indiana National Bank had brought this suit, instead of appellant. When the Indiana bank had the check indorsed to it, it was bound to know whether it was properly indorsed, and it is well settled by the above authorities that it acquired no title to the check through the unauthorized indorsement. The wrong against appellant was the statement by the Indiana bank, through its indorsement to appellant, that it was the rightful holder of the check, and that the indorsement to it was a valid indorsement. The complaint shows that the check was indorsed to the Indiana bank, and then indorsed by that bank to appellant. The evidence supports the answer.

Judgment affirmed.

MAITLAND ET AL. v. REED ET AL.

[No. 5,562. Filed March 15, 1906.]

1. **CONTRACTS.**—*Arbitration.*—*Finality of Decision.*—*Public Policy.*—A building contract requiring the parties to submit questions in dispute to the architect is valid, and such submission, or a valid excuse, is a condition precedent to the maintenance of an action, but a provision that such architect's decision shall be final is void as against public policy. p. 470.
2. **SAME.**—*Associations.*—*Decisions by Officers of.*—*Members.*—*Rights.*—Associations have the right to require all disputes as to the rights of members therein to be submitted for decision to the tribunal established thereby before resort to the courts. p. 472.
3. **APPEAL AND ERROR.**—*Weighing Evidence.*—*Statutes.*—The Appellate Court will not weigh conflicting oral evidence under the act of 1903 (Acts 1903, p. 338, §8). p. 474.

From Laporte Superior Court; *James F. Gallaher*, Special Judge.

Suit by Alexander J. Campbell against Francis E. Maitland and others. From a decree for plaintiff and for defendant John W. Reed, the other defendants appeal. *Affirmed.*

L. L. Bomberger and *Allen G. Mills*, for appellants.

William J. Whinery, for appellees.

ROBINSON, J.—Campbell, a subcontractor, sued the contractor and also the lot owners to recover an amount due him from the contractor and to foreclose a mechanic's lien. The contractor, Reed, filed a cross-complaint against the lot owners—appellants—to foreclose a mechanic's lien. The lot owners filed a cross-complaint against the contractor for damages for failure to comply with the contract.

So far as necessary to determine the questions presented, the facts found by the court are substantially as follows: On June 10, 1903, appellants contracted in writing with appellee Reed to construct a building, on lots owned by them, according to plans and specifications prepared by an

architect named, which contract is set out. Afterward, in August, 1903, Campbell contracted with Reed to do the plumbing, gas piping and sewer work for \$385. The contractor did extra work and furnished extra material for which appellants agreed to pay, making the total amount Reed was to receive for constructing the building \$4,929.26. Reed failed to construct the building, in certain particulars, according to the plans and specifications, and under the contract appellants removed such portions and reconstructed the same at an expense of \$192.88. Reed received \$4,000 from appellants in payment for labor and materials. Within sixty days after the work was done and material furnished Reed filed a notice of his intention to hold a lien, which was duly recorded. For extra work Campbell was to receive \$20 in addition to his contract, making \$405 which Reed agreed to pay him, of which amount Campbell has received \$100. Campbell having failed to do a part of his work according to the plans and specifications, appellants, under the contract, removed and replaced the same at an expense of \$183.88. Campbell filed a notice of intention to hold a lien, but facts are found showing that prior to that time he executed a waiver of his lien, in consideration of \$385 paid him. A reasonable fee for appellee Reed's attorney was found to be \$80.

As conclusions of law the court found: (a) That as between Campbell and appellants the law is with appellants; (b) that Campbell should recover from Reed \$121.12; (c) that Reed should recover from appellants \$736.38 and \$80 attorney's fees, and have his lien foreclosed. Decree accordingly, and that each party to the suit should pay the costs which each has occasioned.

Appellant's filed a plea in abatement to Reed's cross-complaint, alleging the necessity, by the terms of the contract, of a reference to arbitration as a prerequisite

1. to an action by Reed. The demurrer to this answer was properly sustained. The contract contains a pro-

vision that any controversy or dispute arising under the contract "shall be settled by the architect, whose decision shall be final and binding upon the parties hereto, except that in the case of a dispute as to the value of extra work or of work omitted, or of the amount of damages referred to in article five, either party may appeal from the architect's decision to arbitration in the following manner:" Either party desiring to arbitrate shall serve a notice on the other party, stating his grievance and his intention of appealing to a party therein named, or a substitute to be selected as specified, and such arbitrator shall have all the powers conferred on arbitrators by the statutes of Illinois, and his ruling shall be final and conclusive as to all questions submitted to him for arbitration.

The answer alleged that the expense incurred by appellants on account of the failure of Reed to comply with the contract had been audited by the architect and was in a sum named, that Reed had been notified thereof, and that he had not appealed from the architect's decision and had not resorted to arbitration as the contract provided.

The parties might properly agree that any controversy or dispute arising under the contract should be submitted for determination to the architect, and it must be shown that such a condition precedent was performed before bringing suit, or a valid reason shown for its nonperformance. But that provision of the contract which assumes to make the decision of the architect, or of an arbitrator, final, is void. It is not competent for parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of a party therein named upon a dispute which might thereafter arise shall be final and conclusive. *Supreme Council, etc., v. Forsinger* (1890), 125 Ind. 52, 9 L. R. A. 501, 21 Am. St. 196; *Louisville, etc., R. Co. v. Donnegan* (1887), 111 Ind. 179; *McCoy v. Able* (1892), 131 Ind. 417; *Supreme Council, etc., v. Garrigus* (1885), 104 Ind. 133, 54 Am. Rep. 298;

Bauer v. Samson Lodge, etc. (1885), 102 Ind. 262; *Kistler v. Indianapolis, etc., R. Co.* (1882), 88 Ind. 460.

The contract does not require that the dissatisfied party shall appeal from the decision of the architect. It provides that either party may appeal, in certain matters,

2. from the decision of the architect to arbitration.

This is a money demand upon contract, where either of the parties may wish to be relieved from the decision of the architect. In this respect it materially differs from such provisions in the by-laws of an association whereby it is sought to settle differences between the association and a member. In that class of cases one of the parties, the association through its proper officers, is the arbitrator, and good reasons suggest themselves for construing a doubtful provision concerning an appeal in favor of requiring an appeal by a member to certain officers of the association before resorting to the courts. "The policy of the law," said the court in *Bauer v. Samson Lodge, etc., supra*, "as declared in our Constitution and by our decisions, is freely to open the courts to those who seek money due them upon contract, and the party who asserts that the right to invoke the aid of the courts has been curtailed, must show a clear agreement abridging the right." See *Voluntary Relief Dept., etc., v. Spencer* (1897), 17 Ind. App. 123; *Munk v. Kanzler* (1901), 26 Ind. App. 105.

It is argued by counsel that under the act of 1903 the court is required in an action of this character to review and weigh the evidence. The bill of exceptions con-

3. taining the evidence occupies nearly six hundred typewritten pages of the record. Nearly all the evidence consists of the oral testimony of a number of witnesses. Section eight of the act approved March 9, 1903 (Acts 1903, p. 338, §641h Burns 1905), provides: "In all cases not now or hereafter triable by a jury, the Supreme and Appellate Courts shall, if required by the assignment of errors, carefully consider and weigh the evidence and ad-

missions heard on the trial when the same is made to appear by a bill of exceptions setting forth all the evidence given in the cause, and if on such appeal it appears from all the evidence and admissions that the judgment appealed from is not fairly supported by, or is clearly against the weight of the evidence, it shall be the duty of such court to award judgment according to the clear weight of the evidence, and affirm the judgment or return said cause to the trial court with instructions to modify the judgment or to grant a new trial; or to enter such other judgment or decree as to such court of appeal may seem right and proper upon the whole case." The above provision of the statute was very fully considered by the Supreme Court in the case of *Parkison v. Thompson* (1905), 164 Ind. 609, and the conclusion there reached was that it was not the intention of the legislature that there should be a trial *de novo* in the appellate tribunal upon the evidence in the case, nor was it contemplated in the passage of the act that we should take up and examine oral evidence and pass upon its weight without reference to the decision of the trial court, or the means afforded that tribunal for deciding questions of fact. In the opinion in that case, the court, by Jordan, J., said: "In passing upon questions of fact, under the act in question, which depend upon oral evidence given before the trial court, we must take into consideration, not only the evidence in the record, but also the means and tests afforded the trial court for determining the credibility of the witnesses, and the weight to be accorded to their testimony. We must consider and give effect to all inferences and impressions that might have been reasonably deduced by the trial judge by reason of the fact that he saw and heard the witnesses testify, and had the opportunity, by personal observation, to discover any signs of truth or falsehood in respect to their testimony. In a cause where a question of fact or facts depends upon oral testimony for support, and there is a substantial conflict

in the oral evidence, under such circumstances, we will not undertake to reconcile the conflicting evidence, for it must be obvious from the position which we occupy that to endeavor to do so would be virtually useless. Were we to attempt, under such circumstances, to reconcile and weigh the evidence, and interpose our judgment in the case for that of the lower court, great injustice might result. *Pollock v. Carolina, etc., Assn.* [1897], 51 S. C. 420, 29 S. E. 77, 64 Am. St. 683, and cases there cited. Certainly absurdity ought not to be imputed to the statute by holding that it contemplates that this court, under conflicting oral testimony, should weigh the evidence contained in the record, and determine questions of fact depending thereon."

In the case at bar there is a sharp conflict in the evidence upon the material facts at issue between the owners of the building and the contractor. In a case involving many items, extra work and material, and changes in the original contract, it would be expected, as was the case here, that there would be some conflict of opinion among candid witnesses well informed as to the matters about which they testified. Upon a careful consideration of the evidence we can not say that there is not sufficient evidence fairly to support the conclusion reached by the trial court. There is evidence in the record to support the findings of fact, and, while the findings are not as full in some respects as they might have been, yet they are sufficiently full to authorize the conclusions of law as announced by the court. We can not say that we would, from the evidence, have found the facts in all respects as the trial court did; but whether we would or would not have done so is not material, where it must be said that there is evidence in the record supporting the findings as announced by the court. The question is not what conclusion we would have reached from the testimony introduced at the trial, but whether there was evidence authorizing the trial court to reach the conclusion it did.

Judgment affirmed.

POLLARD v. PITTMAN.

[No. 5,612. Filed March 15, 1906.]

1. **APPEAL AND ERROR.**—*Overruling Demurrer to Paragraph of Answer.*—*Facts Provable under Another.*—The overruling of a demurrer to a paragraph of answer is not available error on appeal where the facts contained therein are provable under another paragraph which is not questioned. p. 479.
2. **SAME.**—*Right Result.*—Overruling a demurrer to a paragraph of answer is not reversible error where, under the facts established under another paragraph, plaintiff was not entitled to recover. p. 479.
3. **CONTRIBUTION.**—*Sureties.*—*Bills and Notes.*—Where three sureties pay an equal amount of the debt for which they are jointly liable there can be no contribution. p. 479.
4. **BILLS AND NOTES.**—*Sureties.*—*Payment.*—*New Notes.*—*Consideration.*—Where three sureties, at different times, paid equal amounts on their principal's note, each taking the principal's note with his cosureties on the original note as sureties on such new note, there was no consideration for such new notes, their legal effect being to evidence such payments. p. 480.
5. **SAME.**—*Sureties.*—*Contribution.*—*Refusal of One to Assist in Recovering.*—Where three sureties on a note pay equal amounts thereon, taking an indemnifying mortgage from their principal, and they subsequently agree to enforce such mortgage, and in a suit in the trial court they are only partially successful, and one of them refuses to appeal, such one can not claim contribution where the others successfully appeal such case and receive their indemnity. p. 480.

From Superior Court of Vanderburgh County; *James T. Walker*, Special Judge.

Action by William S. Pollard against Charles E. Pittman and others. From a judgment for defendant Pittman, plaintiff appeals. *Affirmed.*

J. E. Williamson, for appellant.

James G. Owen and *Logsdon, Chappell & Veneman*, for appellee.

WILEY, J.—Action by appellant against appellee and others upon a promissory note. Issues were joined by answer and reply. Trial by the court, resulting in a find-

ing and judgment for appellee. Appellant's demurrer to the third and fifth paragraphs of answer was overruled, as was also his motion for a new trial, and these rulings are the only errors assigned.

Counsel for appellant suggests in his brief that the same legal questions are presented by the ruling of the court upon the demurrer to the third and fifth paragraphs of the answer as those presented by the motion for a new trial, and that for this reason they may be considered jointly.

The note sued upon was for \$500, and was executed April 17, 1888, and became due six months after date. The interest rate fixed in the note was eight per cent, and the complaint avers that the interest was paid to April 17, 1897. A succinct statement of the material facts disclosed by the record is important before taking up the questions for decision. On December 14, 1885, appellant, appellee and four others became sureties for the First Avenue Coal Mining Company, on a note for \$3,000, payable to the People's Savings Bank of Evansville. Subsequently the mining company paid on the note \$1,500. On February 11, 1888, the mining company executed to all of the sureties on that note a mortgage upon all of its real and personal property to indemnify them from any loss. April 17, 1888, appellant paid \$500 on said indebtedness of the mining company, and took back from it a note for that amount, with his other cosureties as sureties thereon. April 23, 1889, Cicero Buchanan, one of the sureties, paid a like amount, and took back from the company a like note. January 9, 1892, appellee paid a like amount in full discharge of said indebtedness, and received from the company a like note for that amount. In 1896, one McWilliams and others filed a suit in the Superior Court of Vanderburgh County against said mining company, and all of said sureties, to enforce liens as laborers and miners for wages. Such proceedings were had that a receiver was appointed for said company to wind up its affairs, which receiver

sold all of the tangible property of the mining company and applied the proceeds thereof to discharge liens, etc. Before the beginning of this suit, Buchanan, one of the sureties, died, and his administrator was made a party. On March 27, 1896, appellant, appellee and the administrator of the Buchanan estate, filed their cross-complaint in said receivership proceedings, predicated upon said notes, and for the enforcement of the lien of said indemnifying mortgage. They subsequently filed an amended cross-complaint, to which the receiver filed an answer in three paragraphs. Upon the trial of the issues thus made appellee recovered a judgment for the amount due upon his note and for the enforcement of the lien of said mortgage. The finding and judgment, however, against appellant and the administrator of Buchanan's estate were against them on the ground that their claims were barred by the statute of limitations. Bray, as administrator, appealed to the Supreme Court from that judgment, and succeeded in securing a reversal, and a direction to the trial court to restate its conclusions of law on the special findings, and render judgment in favor of the administrator for the amount due on the note. Appellant refused to join in said appeal, but elected to abide by the judgment rendered against him. At about the time of the bringing of the McWilliam's suit, appellant, appellee and Bray, as administrator, etc., entered into an agreement to the effect that they would together pursue their legal remedy by suit to its utmost limit, and enforce the lien of their said mortgage on the property of said company; that they would pursue their said claims and rights under the mortgage in and through the courts, and would carry their said suit, if necessary, to the court of last resort in their effort to collect their said claims and save themselves harmless by reason of their said suretyship.

The third paragraph of answer sets out in detail all of the above facts, and the pleading is builded upon the theory of *res judicata*. The theory of this paragraph is that in

the McWilliam's suit and upon the issues joined and tried on the cross-complaint in which appellant, appellee and Bray, administrator, joined, as cross-complainants, the respective rights of the parties were adjudicated. The fifth paragraph counts upon the same facts substantially, but they are pleaded by way of estoppel. From the view of the law we have taken, applicable to the facts in this case, we deem it wholly unnecessary to make further reference to the many facts pleaded in the third and fourth paragraphs of answer.

While no question is raised as to the sixth paragraph of answer, yet it is important to state the facts upon which it is based; for upon such facts the rights of the parties may be finally determined. The paragraph avers in detail all of the material facts to which we have above adverted, relating to appellant, appellee and Bray, administrator, etc., and of the amounts paid by them respectively. It also makes averments in regard to the indemnifying mortgage, the appointment of a receiver, and the winding up of the affairs of the mining company; that in the McWilliams receivership proceedings, appellant, appellee and Bray, administrator, entered into an agreement whereby they mutually agreed to file a cross-complaint in said proceedings, based upon the notes given them as evidence of the payments they had made, and enforce their rights under the indemnifying mortgage, and thus save themselves harmless as far as possible; that in pursuance of said agreement they did file such cross-complaint; that issues were joined thereon, and sets out in detail the proceedings, judgment, appeal, reversal of the judgment as to Bray, etc. It is also averred that appellee urged appellant to join in said appeal, which he declined to do, and that if he had kept his agreement and appealed from said judgment he would have shared equally with appellee and the administrator of Buchanan's estate in the enforcement of their lien against the funds in the hands of the receiver.

There are two reasons why it is unnecessary for us to pass upon the sufficiency of the third and fifth paragraphs of answer: (1) Because all of the material facts

1. averred in either of such paragraphs were provable under the facts averred in the sixth paragraph; (2) because upon the facts averred in the sixth paragraph, which are abundantly established by the evidence, appellant is not entitled to recover in this action. The

2. appellant, appellee, and Buchanan, the three solvent sureties on the original note, each paid an equal amount in satisfaction thereof. Each of them paid his proportionate share at different times, and as each payment was made the mining company gave to the payor its note for the amounts paid, with all the other sureties on the original note as sureties.

It is alleged in this paragraph and there is evidence to support it, that these three notes were given as an evidence of the payments made. It is clear that no new in-

3. debtedness was created. The indemnifying mortgage was an equal protection for all the sureties who might be called upon to answer for the default of their principal. The three sureties who did pay stood upon an equality, for they all paid the same amount. The rule is well settled that where one surety pays more than his proportionate share of the debt of his principal he may proceed against a cosurety for contribution. But this rule can not apply here, for each of the sureties paid an equal amount. Here the three sureties had the same remedy against their principal, or rather, against the fund of the principal in the hands of the receiver. Suppose the principal had been wholly insolvent, and there had been no fund upon which their lien could operate. What would have been their relative positions as to the respective rights in the premises? If they had sued each other upon the respective notes which they held there could have been no recovery. Having a legal right to share and share alike in

the fund in the receiver's hands, and having entered into an agreement to assert that right in a court of law, and one of them having elected and refused to protect his rights by an appeal from a judgment against him, can he subsequently recover from one of his cosureties on the original note and also as surety on the note in suit? If so, it would be unfair, unjust and inequitable.

As above stated, when appellant and his cosureties paid the respective amounts they agreed to pay, and the mining company gave to them the \$500 notes, no new obli-

4. gation was created. There was no consideration for the new notes, and they only stood as an evidence of the amounts paid by the three solvent sureties.

The facts averred in the sixth paragraph of answer tendered an issue for determination by the trial court, which facts, if established, are sufficient to bar ap-

5. pellant's right to recover regardless of the sufficiency of the third and fifth paragraphs of answer. There is an abundance of evidence to establish these facts.

The case which Bray, administrator, appealed to the Supreme Court is *Bray v. First Avenue Coal Min. Co.* (1897), 148 Ind. 599. The decision in that case fully establishes the respective rights of the three solvent sureties. It was there held that where sureties on a note made payments thereon, and a note executed by the principal to each surety for the amount paid by him, such payments would not be treated as loans to the principal, but as payments on the note upon which they were sureties, and are covered by a mortgage given them by the principal to indemnify them as such sureties. It was also held that in such case the notes given for the amounts paid by the sureties were subject only to the statute of limitations applicable to any notes secured by mortgage. In the course of the opinion it was said: "It was to reimburse the sureties in case they were compelled to make such payment that the mortgage security was given them. This security they

had a right to rely upon, and we do not think the six-year statute of limitations was any bar to their right to recover. The three solvent sureties who had undertaken the payment of the debt to the bank, stood on an equality. They so recognized one another, and were so recognized by their principal * * * which gave to each of them its note for the amounts paid by them respectively, and paid to each of them, up to the year 1895, interest on the several notes so given, as evidence of the part of the bank debt which each had been compelled to pay." It is thus made clearly manifest that if appellant had kept his agreement with his cosureties he would have shared equally with them in the distribution of the funds in the receiver's hands which were secured to them by the lien created by the indemnifying mortgage. In that event neither of them could have complained of the other, and neither of them could have maintained an action for contribution. Appellant having slept upon his rights, he cannot now pursue the only remaining solvent surety to recover from him upon the note in suit.

The trial court reached a correct result, and by its judgment determined the rights of the parties equitably. The judgment is affirmed.

HARTZELL ET AL. v. HARTZELL, ADMINISTRATRIX.

[No. 5,459. Filed December 12, 1905. Rehearing denied February 23, 1906. Transfer denied March 15, 1906.]

1. **DECEDENTS' ESTATES.—Final Report.—Right of Administrator to a Discharge.**—Upon the approval of the final report of an administratrix, she is entitled to be discharged. p. 484.
2. **CONTRACTS.—Judgment.—Conditions.—Time of Performance.**—Where the heirs enter into a compromise of their disputes as to their rights in a decedent's estate, and a certain time is given to the widow in which to perform certain conditions, the fact that she performed same before complete performance of the

conditions by the other heirs, where such conditions were not dependent upon prior performance by such others, can not be objected to by the other heirs. p. 484.

3. **APPEAL AND ERROR.**—*Appellate Court Rules.*—*Briefs.*—Where appellants fail to set out the evidence or the substance thereof in their brief, no question depending thereon will be considered. p. 485.
4. **EVIDENCE.**—*Decedents' Estates.*—*Witnesses.*—*Executors and Administrators.*—*Widows.*—The widow, administratrix of her deceased husband's estate, is a competent witness to testify as to where personal property belonging to such decedent was found after his death. p. 486.
5. **JUDGMENT.**—*Motion to Modify.*—*Conclusions of Law.*—Where the judgment follows the conclusions of law, a motion to modify same presents no question. p. 486.

From Wells Circuit Court; *Edwin C. Vaughn*, Judge.

Final report of May D. Hartzell as administratrix of the estate of John T. Hartzell, deceased, to which George W. Hartzell and another except. From an order overruling such exceptions, exceptors appeal. *Affirmed.*

Levi Mock, John Mock and George Mock, for appellants.
Jay A. Hindman, for appellee.

ROBINSON, J.—Upon the questions raised by appellants' exceptions to the final report of appellee as administratrix of the estate of John T. Hartzell, deceased, the court found, in substance, the following facts: The appellee was chargeable with \$1,428.16 and has expended \$482.50, leaving in her hands \$945.66. She filed her final report and resignation in compliance with a certain compromise agreement between her and appellants, which compromise agreement was approved by the circuit court of Darke county, Ohio, and made the finding, order and judgment of that court in a certain action then pending therein. The terms of this compromise were that an action between appellants, as administrators, and appellee, then pending in the supreme court of Ohio, was to be dismissed, and \$1,000 then in the hands of the clerk of the circuit court of Darke county was to be paid to appellee or her attorneys. Appel-

lee agreed to accept \$3,400 in full payment of her claim to dower in all the lands of John T. Hartzell, deceased, in the states of Ohio and Indiana, and in full payment and satisfaction of her yearly allowance and distributive share in the personalty of the decedent, and in full payment of all claims she may have against the estate of decedent or against appellants. In consideration of the \$3,400 and the \$1,000, appellee agreed immediately to execute and deliver in escrow a quitclaim deed, to be delivered to appellants on fulfillment of this agreement, thereby releasing to the estate all her interest in the lands of the decedent in Ohio; and in consideration of the delivery of the quitclaim deed for lands in Indiana the appellants agreed to execute to appellee at that time their bond for \$1,700, to secure to her the payment of the proportionate share of the \$3,400, the appellants to proceed promptly as such administrators to sell the lands of decedent, and out of the proceeds pay the \$3,400 "within nine months from the date of the entry of this decree." Appellants were to apply a certain per cent of the proceeds of such sale of the land to the payment of the \$3,400 until the same was paid in full, but all to be paid within nine months. It was further agreed that at the time of the entry of the compromise appellee was to release to the estate all her right and interest in five notes and a check which she claimed to hold against the estate, and to surrender them to appellants on the final payment of the \$3,400. The agreement further provided for the dismissal of certain suits then pending and the payment of costs. Appellee agreed to proceed, and within nine months from the date of the entry of the decree, to account to the estate for all property which had come into her possession as administratrix, and to release her claim to act as administratrix, and agreed within nine months to account to appellants for all rents and other property received and collected by her, less any legal payments, such as taxes, necessary repair to real estate, court charges in administration

or money paid to administrators, "the amounts so received under said accounting and collected to operate as a credit upon the compromise consideration of \$3,400 aforesaid, and to be deducted therefrom." The court further found that there was occasioned by the exceptions filed and the trial, expenses amounting to \$100 for the services of attorneys for the administratrix.

As conclusions of law the court stated: (1) That the final report as corrected by the court should be approved; (2) that the administratrix should be discharged from further duties and liabilities as such; (3) that under the terms of the compromise agreement and order of court appellee is entitled to retain the \$945.66, and after deducting the \$100 attorneys' fees therefrom the residue should be credited upon the compromise consideration of \$3,400; (4) that the costs should be paid by appellee. Appellants excepted to each conclusion of law.

It appears that the report of appellee was her final report as administratrix, and that she had in her hands a certain balance. The amount that the court finds

1. she is chargeable with is more than the amount she had charged herself with in the report, but, if the amount stated by the court is correct, it is not material whether the court made the correction or the administratrix made it upon the court's order. The additions made by the court consisted of property not inventoried and a sum received for certain property in excess of the appraisement. As the corrected report became her final report, and upon its approval she was entitled to be discharged, there was no error in the first and second conclusions of law.

The third conclusion of law is right upon the facts found. It is true the compromise agreement which was made the decree of the circuit court in a cause then pending

2. between the parties to the agreement, contains certain conditions to be performed by the parties, and it is not found that these conditions have all been per-

formed. But the compromise agreement expressly provides that within a time fixed the appellee should account for all personal property which had come into her possession under her claim as administratrix, and also to account for rents and other property, and that the amounts so received under such accounting and collected were to operate as a credit upon the compromise consideration of \$3,400, and were to be deducted therefrom. The performance of this condition was not dependent upon the prior performance of any other condition contained in the agreement, and the conclusion of the court that the net amount in her hands as administratrix should be credited upon the \$3,400 was in accordance with the decree. When her final report was approved, and it appeared there was a balance in her hands as administratrix, it was the court's duty to direct the disposition of the balance; and the effect of the conclusion is, upon the facts found, that appellee is entitled to retain this balance. Objection is also made to the third conclusion of law on the charge that it charges the estate with \$100 as attorneys' fees. It can not be determined from the findings themselves whether the changes made by the court in the final report were because of any exceptions filed. This part of the third conclusion is based upon the fifth finding, and if this finding is sustained by sufficient evidence the conclusion is right. That this finding and

each of the other findings are not sustained by sufficient

3. evidence are assigned as reasons for a new trial. But, as stated in appellee's brief, the brief of counsel for appellants contains no recital of the evidence as required by rule twenty-two of this court. The evidence occupies more than 260 pages of the record, but no attempt has been made to set out in the brief in any form the evidence upon any of these questions. See *Chicago, etc., R. Co. v. Wysor Land Co.* (1904), 163 Ind. 288, and cases there cited.

Complaint is made that appellee was permitted to testify to many matters that occurred during the life-time of the decedent, and in the argument is set out the fol-

4. lowing question asked appellee: "In the twentieth exception you are charged with having converted to your own use furniture in the hotel. You may state what the fact is about there being any furniture in the hotel belonging to the estate of John T. Hartzell after the death of John T. Hartzell?" Objection was made that the question involved a matter that occurred before the death of the decedent, and she is incompetent to testify. The objection was properly overruled. There was a controversy as to the ownership of certain furniture in a hotel, whether it belonged to appellee or to the estate. As administratrix, appellee was required to inventory and account for the personal property of the decedent. She was not asked concerning any matter that occurred during the life-time of the decedent. She was a competent witness to testify as to where personal property, belonging to the decedent, was found after his death.

Judgment affirmed.

ON PETITION FOR REHEARING.

ROBINSON, J.—As the fourth conclusion of law was originally stated by the court and the judgment rendered thereon, it was adjudged that the costs be paid out of

5. the estate, but the motion afterward made by appellants that the costs be taxed against appellee personally was sustained. The motion to modify the judgment in other respects was properly overruled, for the reason that the judgment follows the conclusions of law. No question is presented by a motion to modify the judgment when the judgment follows the conclusions of law.

Petition overruled.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY v. BRYAN, ADMINISTRATRIX.

[No. 5,433. Filed October 24, 1905. Rehearing denied February 22, 1906. Transfer denied March 15, 1906.]

1. **MASTER AND SERVANT.—Railroads.—Assumed Risk.**—Where the plaintiff's decedent, defendant's brakeman over a year, stood by the side of the track and signaled the engineer of the freight-train to back three cars onto the side-track, and the engineer slowly backed such cars according to signals, and the appliances on the door of one of such cars, in plain view of decedent, caught his coat and dragged him between such car and the platform, inflicting mortal injuries, there being nothing to prevent decedent from stepping back, the injury resulted from an assumed risk and there can be no recovery therefor. p. 489.
2. **SAME.—Assumed Risk.—Appreciation of Dangers.—When for Jury.—When for Court.**—Risks assumed by the servant must be appreciated, and such fact is a question for the jury where there is a conflict in the evidence, but where but one conclusion can be drawn from the evidence, it becomes a question of law for the court. p. 490.
3. **APPEAL AND ERROR.—Interrogatories to Jury.—Reversal.—When New Trial Refused.**—Where the evidence and the answers to the interrogatories to the jury show that the plaintiff can not recover, a judgment in his favor will be reversed with directions to render judgment for defendant on such answers. p. 491.

From Morgan Circuit Court; *Joseph W. Williams*, Judge *pro tem*.

Action by Almeedie Bryan as administratrix of the estate of Joseph A. Bryan, deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. *Reversed*.

E. C. Field, *H. R. Kurrie* and *G. W. Grubbs*, for appellant.

East & East, for appellee.

ROBY, J.—The appellee averred, in substance, that appellant was, on March 18, 1899, a corporation owning and operating a railroad, and that the decedent was in its service

as a brakeman; that it had theretofore negligently constructed a platform and switch, immediately west of the depot at its station at Crawfordsville, and had negligently constructed the platform for a long distance at the height of four feet, and so close to the east rail of its track as not to allow cars of extra width to leave a space in passing of more than six or seven inches, which space was not sufficient for defendant's employes to stand in and escape injury while one of its extra-width cars was passing along said platform, but was likely to injure them while in the discharge of their duties; that it was also negligent in constructing and maintaining its said track in a curve, with the east rail lower than the west one, thereby causing south-bound cars suddenly to lean to the east, and close the space between such cars and the top of the platform suddenly, thereby further endangering the lives of its employes; that on said day it negligently caused a car, known as a hay or furniture care, much wider and much larger than those in ordinary use, to be placed in one of its trains, and negligently caused said car to be pushed rapidly southward over said track, west of said depot and platform, and in so doing caused the space between the top edge of said platform and the side of said car to be reduced to six or seven inches, when such space would, with an ordinary car, have been fifteen or sixteen inches, "and that in so doing it ran said hay car against said Joseph A. Bryan, who was then in the space between the cars and said platform, in the line of his duty, and before he could escape the front end or sides of said hay car in some manner caught him, and so rolled and squeezed his body as to crush and break his bones, so that he then and there died." It is also averred that decedent was unaware of the danger of the place; that he had no knowledge that the car was of extra width, or that the space in which he was standing would be so closed as to endanger his life; that he could not appreciate or understand the dangers surrounding him; that his work was hurriedly

done, and while doing it he was compelled to watch the car south of the hay car; that he did not discover his danger until it was too late to escape; and that by reason of appellant's negligence, as set forth, he was injured and killed. Wherefore, etc.

Formal and uncontroverted averments have been omitted from this summary. The issue made by a denial was submitted to a jury and a verdict for \$5,000, with answers to interrogatories, returned. Appellant's motion for judgment, notwithstanding the general verdict, was overruled, as was its motion for a new trial, and judgment was rendered on the verdict. Appellant, by exceptions and assignments of error, questions each adverse ruling.

The jury in its answers to interrogatories, as well as by the general verdict, finds the general conditions substantially as detailed in the complaint. It also states

1. that decedent had been in appellant's service as a brakeman upon a local freight-train from one to one and one-half years, making daily trips, and was familiar with the platform and siding referred to, and that at the time of his death an engine and three cars were being pushed south on the side-track, the car which caught him being the south or front one. Said cars were pushed over said track, in response to signals given by decedent, at a rate of from four to five miles an hour, and there was nothing to prevent his seeing the hay car. He crossed the track from the west to the east side, a short distance ahead of the approaching cut of cars and engine, having first signaled them back, which signals he continued. These signals were properly obeyed. Those operating the engine neither knew nor had reason to believe that decedent was in any peril, and stopped the engine at the first indication thereof. Decedent was not between the platform and car when struck by the car, but was north of the platform, at the northwest corner of the platform, where he stood from the time the car was twenty-five feet distant until part of

it passed him, where he continued to stand until he was caught. It was his intention to remain out of the space between said platform and track, and far enough from the car to permit it safely to pass him. While said car was passing, decedent's coat was caught by some of the appliances connected with the door of said car, and he was thereby drawn between the car and said platform and killed. If his clothing had not so caught, the accident would not have occurred. It thus appears that decedent was not in between the platform and the car in the line of his duty when struck by the car, but was without any intention of going into such place. He stood too near the moving train. His coat was caught by the door irons and he was carried to his death. It might have been under the wheels; it was between the car and platform. Had he been between the track and platform, his escape from the advancing car would have been cut off by the platform. Standing where he did, there was nothing to prevent his stepping back and away from it, had he chosen to do so. These facts are inconsistent with the case made in the complaint.

The facts upon which it is to be determined (1) whether decedent assumed the risk by reason of which his death occurred, and (2) whether he was contributorily negligent, are largely identical. The question of assumed obvious risk is, however, entirely distinct from the issue of contributory negligence.

It has been recently held, in order to charge the employee with the risk, that it must appear that he appreciated the danger to which he was exposed, and that where

2. evidence is doubtful or conflicting the question may be for the jury. *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, and authorities cited; *Baltimore, etc., R. Co. v. Roberts* (1903), 161 Ind. 1; *Wright v. Chicago, etc., R. Co.* (1903), 160 Ind. 583. When the circumstances permit of but one conclusion, the question is

for the court. The character of the defect, the imminence of danger, the opportunity and capacity of the employe may be, and often are, of such a character as to preclude any controversy upon this subject. *Chicago, etc., R. Co. v. Tackett* (1904), 33 Ind. App. 379.

Decedent was an adult, in possession of his faculties, and familiar with the occupation and locality. The train moved, as he ordered it to move; every condition was open and observable. There is no basis upon which to deny his knowledge of the conditions, and such knowledge, of necessity, carried with it the appreciation of danger arising from them. The conclusion follows that the risk was an assumed one. *Chicago, etc., R. Co. v. Tackett, supra; Wortman v. Minich* (1901), 28 Ind. App. 31.

It is unnecessary to go into the question of contributory negligence. The sufficiency of the evidence is denied by the motion for a new trial. The facts found by the

3. jury are as favorable to appellee as the evidence warranted. If it were otherwise, the mandate would be for a new trial, but it is impossible to attribute the decedent's injury to any cause which renders the appellant liable for damages on account thereof. It follows that a new trial ought not to be ordered, and that the cause should be finally disposed of. The evidence is not of a character to sustain a verdict for appellee.

Judgment reversed and cause remanded, with instructions to sustain motion for judgment on interrogatories and their answers, notwithstanding the general verdict.

CASE ET AL. v. COLLINS ET AL.

[No. 5,482. Filed January 11, 1906. Rehearing denied March 16, 1906.]

1. DESCENT AND DISTRIBUTION. — *Personalty. — Conversion. — Taking Title in Individual Name.*—Property purchased by the husband with money belonging to the wife, on deposit in a bank at her death, equitably belongs, two-thirds to her children and one-third to such husband. p. 499.

2. **CONTRACTS.**—*Family Settlements.*—*Consideration.*—A contract executed by the children of decedent, the surviving husband and the second wife, in settlement of the property interests in the deceased wife's estate, is supported by a sufficient consideration. p. 499.
3. **PLEADING.**—*Complaint.*—*Trusts.*—*Conversion of Funds.*—A complaint for the recovery of converted trust funds is good though it shows that by the terms of the contract creating the trust it shall continue until the death of the trustee, a cause of action arising immediately after the breach of such agreement by the trustee, and not after his death. p. 500.
4. **CONTRACTS.**—*Family Settlements.*—*Consideration.*—*Widow's Election.*—*Statutes.*—A family settlement by the second wife, the husband and the children of the deceased first wife, of the property rights in the estate of such decedent, is supported by a valuable consideration as to such second wife, and she has no right under §2665 Burns 1901, §2504 R. S. 1881, to a period of one year after such husband's death to decide whether she will be bound by such contract of settlement. p. 500.
5. **TRIAL.**—*Motion.*—*Venire de novo.*—Where the special findings follow the theory of a sufficient complaint, and contain the material facts therein alleged, a motion for a *venire de novo* because of defects therein should be overruled. p. 505.
6. **APPEAL AND ERROR.**—*Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence. p. 506.
7. **JUDGMENT.**—*Pleading.*—*Prayer for Lien.*—*Decree for Transfer of Title.*—Where a complaint for the recovery of converted trust funds prays that a lien be declared therefor on certain real estate, the legal title to which is in a third party, a decree that the title thereto be vested in the trustee is without the issues. p. 506.

From Superior Court of Vigo County; A. G. Cavins, Special Judge.

Suit by Martha J. Collins and others against John W. Case and another. From a decree for plaintiffs, defendants appeal. *Reversed.*

Louis Reichmann, for appellants.

A. A. Beecher, Charles Whitlock and Josiah T. Walker, for appellees.

WILEY, J.—Appellees were plaintiffs below and brought this suit against appellants to declare a trust, to compel an accounting, and for the removal of the appellant John

W. Case as trustee. The complaint was in a single paragraph, to which a demurrer was overruled. Appellants answered separately in two paragraphs: (1) A general denial; (2) the agreement upon which appellants base their action was executed without consideration. At the request of the parties the court made a special finding of facts and stated its conclusions of law thereon. Appellants each excepted to the conclusions of law. Their motions for a *venire de novo* and for a new trial were overruled. All these rulings adverse to them are assigned as errors.

The amended complaint is of unusual length, but its material averments are, in substance, as follows: The appellant John W. Case is the father of appellees. The appellant Martha P. Case is his wife and the step-mother of appellees, and she is the childless second wife of said John. Appellees are the children of appellant John by his first wife. On October 13, 1892, the appellees were all married, and on said day they, together with their husbands and appellants, executed a written contract, a copy of which is made an exhibit to the complaint. By the terms of said contract it was provided and agreed by all the parties that all surplus income arising from all real estate heretofore conveyed to each of appellees should be placed at interest for the benefit of appellees and the appellant Martha P. Case, each to have one-fourth interest in said surplus income and the accumulated interest thereon. It is then alleged that the conveyances herein referred to were all of the conveyances executed by appellees to each other, conveying a fee-simple title to certain real estate therein described, and in the execution of which appellant John W. Case, then a widower, joined as grantor on August 15, 1891; that all said deeds of conveyances were executed at the instigation and request of appellant John W. Case; that during the life of the mother of appellees she deposited to her credit in a certain bank in Terre Haute, Indiana, a sum of money; that she died on the — day of ———,

and left surviving her as her sole and only heirs appellant John W. Case and the appellees, her daughters; that afterward, without the knowledge of appellees, said appellant accepted in lieu of said deposit, and in full payment of the amount thereof, a deed from one _____, for certain real estate in the city of Terre Haute, designated in the contract filed herewith as "the house on Thirteen-and-one-half street, and which property is more particularly described as follows, to wit: [Here follows a minute description of the property]."

That at the time the agreement herein was entered into appellees were the equitable owners of the undivided two-thirds of said real estate, and, as one of the considerations for the execution of said agreement, appellees agreed that said Martha P. Case should have the legal title to said property, and contemporaneously with said agreement they executed to her a deed therefor; that she took possession thereof under said agreement and deed, and has ever since held and claimed said property with undisputed title, and has enjoyed the fruits and rents thereof, and has ever since held the same as her own; that prior to the execution of said agreement, appellant John W. Case, Martha J. Collins and her husband, and Sarah E. Vermillion and her husband deeded to appellee Mary F. Joseph by warranty deed certain real estate, which is specifically described; that prior to the execution of said agreement said John W. Case, Mary F. Joseph and her husband, and Sarah E. Vermillion and her husband conveyed to Martha J. Collins by warranty deed certain real estate which is specifically described; that prior to the execution of said agreement said John, Martha J. Collins and her husband, and Mary F. Joseph and her husband conveyed by warranty deed to Sarah E. Vermillion certain real estate, which is also specifically described. It is then alleged that each of said conveyances was made subject to the life interest of grantor, without designating any particular one of the sev-

eral grantors, and that each of said parties now is and was at the time of the execution of said contract the owner in fee simple of the respective tracts of real estate, "subject to the life interest of the grantor;" that in the contract heretofore mentioned between the parties there was this clause or expression: "All surplus income to lands heretofore deeded to said children," and it is averred that said clause had reference to, and meant, and was so understood by the parties to include, "all the rents and profits of and arising from all the real estate hereinbefore described, except the land conveyed to said Martha P. Case, known as the 'Thirteen-and-one-half street property,' less taxes and costs of repairs thereon, and less such part of said rents as might be required in addition to what said John W. Case received from the interest on said \$1,400, referred to in said contract. * * * Also in addition to what said Case might receive from the use and control of the stock of goods referred to in said contract to defray the necessary living expenses of said Case."

It is then averred that as an inducement and consideration for the appellees and their husbands to join in the conveyance of the Thirteen-and-one-half street property to appellant Martha P. Case, John W. Case agreed by the terms of said contract to save all surplus income arising from the rents and profits of the real estate theretofore conveyed to appellees, and to place the remaining portion thereof at interest for appellees and said Martha P. Case, each to have an equal share thereof; that a further consideration for the execution of said contract was the determination and settlement of the respective rights of the several parties in and to the rents and profits of the real estate theretofore conveyed to appellees during the lifetime of said John W. Case; that by the terms of said contract it was intended and understood by the parties thereto that the appellant John W., as trustee for all the other parties, was to collect the rents and profits arising from the real

estate owned by appellees, and that he was to act as trustee in handling said rents and profits, and that as such he did receive rents and profits therefrom from appellees aggregating \$4,383; that said appellant wrongfully and unlawfully in violation of said trust, with intent to cheat and defraud appellees, paid to his co-appellant Martha P., who wrongfully and unlawfully received and obtained possession of said money for the purpose of defrauding and assisting in defrauding appellees out of their part thereof, and that the appellant Martha P. conspired with her co-appellant and invested said money in real estate, taking the title thereto in her own name.

The complaint then sets out a description of the real estate, which it is alleged that appellant Martha P. purchased with said surplus income and had conveyed to her in her own name. It is then alleged that of the aggregate sum of \$4,383, which appellant John W. received as rents and profits of said real estate appellees did not know and had no means of knowing what part thereof was necessary to be used in paying taxes and expenses of repairs, but that the same ought not to exceed \$1,000, and that under said contract no part of said sum of \$4,383 was either necessary or used in paying any expenses of said John W., outside of taxes and repairs on said real estate; that in the purchase of said real estate by the appellant Martha P. she, knowing her undue influence upon her co-appellant, from time to time, as said "surplus income" was collected from appellees, would take possession of the same, allowing the several sums to accumulate in her possession until some substantial payment could be made on one of the several pieces of real estate which she had purchased; that after such purchase the appellant Martha P. used the "surplus income" thereafter accumulated, belonging to appellees, in making lasting and valuable improvements upon said real estate, the title to which she had taken in her own name.

It is then alleged that \$1,000 worth of valuable timber was taken from the real estate owned by appellees, made into lumber, etc., and used in making valuable improvements on the property which appellant Martha P. had purchased with said "surplus income;" that the appellant John W. has been unlawfully violating his trust in permitting his coappellant so to misuse the "surplus income" entrusted to him; that said John W. is wholly insolvent and unable to account to appellees for that part of the "surplus income" paid to him since the execution of said contract; that at the time of the execution of said contract the appellant Martha P. was without any money or property; that she has no other property or money except the surplus income herein alleged to be invested in said real estate; that much of the proceeds and rentals of the farm lands of appellees has been collected and taken possession of by appellants and by them unlawfully invested in property or other securities in the name of the appellant, Martha P.; that the amount of rentals secured in this manner is unknown to appellees; that appellants have not paid any part of said "surplus income" to appellees, nor have they paid anything for the timber taken from their lands; that appellees have frequently requested appellants to account to them for said "surplus income," but that they have failed and refused to do so. It is then alleged that the interest on the \$1,400 has been fully paid to said John W. according to the provisions of said contract. The prayer of the complaint is that an accounting be taken of said trust property, and the rents, income and profits thereof which have come into the hands of appellant John W., and that whatsoever amount shall be found to be due appellees, or either of them, shall be declared a lien on the real estate which was purchased with said surplus income, the title to which was taken in the name of the appellant Martha P.; that said John W. be removed from the trusteeship, and that a successor be appointed in his stead, etc.

The contract to which reference is made is as follows:

"This agreement witnesseth, that whereas John Case has now on hands and in bank the sum of \$1,440 and it is his desire to have the same saved for his children now living, now, therefore, he turns the same over to his children now living, to wit, Martha J. Collins, Mary F. Joseph and Sarah E. Vermillion, they to have the principal and all accumulated interest on same, except what is needed for a living for said John Case and his wife Martha, he to have the interest of the same as aforesaid, and now said Martha Case gets the legal title to the house on Thirteen-and-one-half street, and is to get the stock of goods now in the storeroom on West Main street in said city, but said John retains a life interest in said stock, and is to have absolute control of the same during his natural life. And at the death of said John, Martha, his wife, is to have as her share of said John's estate the sum of \$400, now in the saving funds in her name and in the name of the said John, and is to have the aforesaid Thirteen-and-one-half-street real estate described in a deed of this date, and said John is to have the absolute control of all said property during all of his natural life; and in case of the death of said John first, it then goes to his wife, said Martha, who is also to have the household goods, the wagon, the horse and harness and the buggy, and said children, Martha J. Collins, Mary F. Joseph and Sarah E. Vermillion, hereby join in the conveyance of the land on conditions herein named, said John Case to pay taxes on same, this being a full and complete settlement of the estate of said John Case by and between all parties hereto. All surplus income of lands heretofore deeded to said children shall be saved and placed at interest for said children after payment of taxes, repairs and expenses of said John, said wife Martha to have a share equal with said children in same."

The complaint proceeds upon the theory that under the contract between the parties an express trust was created; that the appellant John W. Case was named therein as trustee, and that the appellants connived together and

converted the trust funds, designated in the complaint and contract as "surplus income," to the sole use and benefit of the appellant Martha P. The complaint is not by any means a model pleading, and it is not specifically stated therein how appellant John W. Case or the appellees derived their title to the several tracts of real estate which were conveyed to appellees in 1891. It appears from the record, however, that they derived their title through the mother of appellees, the first wife of appellant John W. Case, in which the latter had a life estate. It would seem, therefore, that while said appellant was a widower they agreed to a partition of the real estate, and they all joined in deeds conveying to each of appellees a portion thereof. In all of said deeds there was a reservation of a life estate in "the grantor." There is not even a specific averment in the complaint that such reservation was for the use and benefit of said appellant, but we think it is clearly manifest that that was the intention. It is shown by the complaint that at the time of the death of the first

1. wife of John W., the mother of appellees, she had to her credit in the bank some money, and that in lieu thereof the appellant John W., without the consent or knowledge of appellees, accepted a deed for certain property designated in the complaint as "the Thirteen-and-one-half street property," and that he took the title thereof in his own name. Under these averments appellees had an undivided two-thirds interest in said property, for it was purchased with money, or taken in lieu of money, in which they were entitled to share, and equity would follow such money into the property thus purchased, and give to them their interest therein. After the marriage of John W. to his co-appellant, it seems that the parties in interest
2. here, got together and attempted to make a settlement of all property matters between them, and especially as to the Thirteen-and-one-half street property.

In our judgment there was ample consideration passing between the parties to support the contract entered into.

Two objections are urged to the complaint by appellants:

(1) That the contract declared upon is executory, and does not take effect until after the death of John W.

3. Case; (2) that appellant Martha P. Case is not bound by the contract, and has one year after the death of said John W. to make an election as to whether she will be bound by the contract or not. We do not think that either of these objections is tenable. While it is true that the contract is executory in the sense that it is a continuing contract until the death of John W., it does not necessarily follow that he or his co-appellant is authorized to violate the terms of the contract, and appropriate all surplus income arising thereunder to their own use. The contract creates a continuing trust during the lifetime of John W., and makes him the trustee for all the parties. It therefore becomes his duty to receive all the money arising under such trust, and to account for it according to the terms of the same. The complaint shows that he has received a large sum of money as such trustee, and that he has unlawfully disposed of the surplus income, to the detriment of the appellees.

We are unable to see any real foundation for the second objection to the complaint, and none has been brought to our attention. Appellant Martha P. certainly re-

4. ceived a valuable consideration for entering into the contract, for she received a deed conveying to her a fee-simple title to valuable property, in which her co-appellant and the appellees joined. Prior to the execution of that deed they all had an interest in that property, and they parted with their interest therein for her use and benefit.

Counsel for appellant relies upon §2665 Burns 1901, §2504 R. S. 1881, to support his contention that appellant Martha P. is not bound by the contract, and has a year after the death of her husband to elect, etc. A mere refer-

ence to that statute in connection with §2663 Burns 1901, §2502 R. S. 1881, will be sufficient to show that it has no application under the facts in this case. Section 2663, *supra*, provides: "The jointure of the wife, if consisting of real estate, must not be less than a freehold estate in lands, to take effect, in possession or profit, immediately on the death of the husband." Section 2665, *supra*, provides that if before coverture, or if after coverture, any such jointure or pecuniary provision shall be assured or given for her jointure, in lieu of her right to one-third of the lands of her husband, she shall make her election within one year after the death of her husband, whether she will take such jointure or pecuniary provision, or whether she will retain her right to one-third of the lands of her husband. It is plainly evident that this contract was not made in lieu of her interest in her husband's real estate. From the complaint it is made clear that he did not possess any real estate except that which was conveyed directly to Martha P., in which appellees and their father had a joint interest, and in which deed they all joined. True, he had a life interest in the real estate conveyed to appellees, but that interest would cease to exist from the moment of his death. Under the agreement between all the parties appellant Martha P. became the owner in fee simple of the real estate conveyed to her, and which absorbed all of the real estate in which her husband had any fee-simple right. Our conclusion is that the complaint was sufficient, and the demurrer thereto was properly overruled.

By the special findings the following facts are exhibited: Appellant John W. Case is the father of appellees. Nancy Jane Case was the mother of appellees. She died January 12, 1884, and left surviving, as her sole and only heirs, appellant John W. and his children, appellees. At the time of the death of Nancy she had on deposit in the bank \$750. After her death the bank failed, and the appellant John W. received in full settlement a portion of said sum, with

which he purchased certain real estate, which the finding specifically describes, and took the title thereto in his own name. On August 13, 1892, appellees were claiming to be the owners of an undivided interest in said real estate as heirs of their mother, and as part owners of the money with which said real estate had been purchased. On August 13, 1892, appellants were husband and wife, and are now. On August 15, 1891, appellant John W. was a widower. On the last-named date he joined in a deed to appellee Sarah E. Vermillion, conveying to her certain real estate, describing it. At the time of said conveyance said John W. was the owner of a life estate in said real estate, and joined in the deed for the purpose of partition, and reserved for himself his life estate therein. On said date he also joined in another deed to the appellee Sarah E. Vermillion and her husband, conveying to them certain real estate, specifically described, in which lands he owned a life estate, but joined therein for the purpose of partition, and reserved to himself such life estate therein. On said day he joined in a like conveyance to appellee Mary F. Joseph and her children, conveying to them certain real estate, which is described. He was at the time the owner of a life estate therein, and joined in said deed for the purpose of partition, reserving to himself said life estate. On the same date he joined in a deed to appellee Mary F. Joseph, conveying to her certain described real estate in which he owned a life estate, and joined in said deed for the purpose of partition, and reserved unto himself said life estate. On the same day he joined in two deeds to the appellee Martha J. Collins, conveying to her certain described real estate. He also owned a life estate therein, and joined in said deeds for the purpose of partition, and in each of them reserved his life estate therein. The appellant John W. is now and has been ever since August 15, 1891, the owner of a life estate in all of the lands in which he at that time joined in conveying. On August 13, 1892, ap-

pellees, with their respective husbands, joined with appellant John W. in the execution of a deed to the appellant Martha P., and thereby conveyed to her in fee simple the real estate which John W. purchased with the money belonging to his wife, and the title to which he took in his own name. Appellants, in consideration of the execution by appellees and their husbands to the appellant Martha P. Case of the deed executed on August 13, 1892, entered into a contract with appellees and their husbands as follows, to wit. [Here the court set out in its special findings the contract between the parties in full, which contract appears in a former part of this opinion.] The court then finds that the phrase "lands heretofore deeded to said children," in the contract refers to the lands conveyed to the appellees in the several deeds which the findings show were executed on August 15, 1891, and that the phrase: "Thirteen-and-one-half street real estate described in a deed of this date" refers to the property conveyed to appellant Martha P. as heretofore found. It is then found that the appellant John W., since the execution of the agreement, has received as income from the lands conveyed to appellees, as heretofore found, all the rents and profits of said lands, and has paid all the taxes and liens and assessments against the same, and has accumulated a surplus above his expenses of caring for the property, and above his expenses of collection and disbursement of the funds, and above his living expenses and those of his co-appellant Martha P. the sum of \$1,500, which said sum he put out of his hands and into the hands of his co-appellant, who, knowing its character, with the same purchased certain real estate, which the finding specifically describes, and took the title in her own name, and has ever since held the same adversely to appellees. The appellant John W., out of the income from said real estate, had remaining, above all his expenses and the purchase price of the real estate to which his co-appellant took title, sums of money sufficient for, and with which he

has made, certain valuable improvements upon said real estate, and that he now has nothing on hand derived from the income of said real estate. Said John W. is unable to read and write, can not keep written or book accounts, is unlearned, can not calculate in figures, and is aged and bodily infirm. He kept no account of the funds received by him as income from the lands hereinbefore described, and does not know how much he received or expended, and is wholly unable to give any account of such money, and is incompetent to collect and care for the same in the future.

Upon these findings the court stated its conclusions of law as follows: (1) That by the execution of the contract appellant John W. declared a trust to which he himself was to be trustee in such part of the income, from all sources from said lands that should come into his hands, as remained after the payment of all legal taxes, assessments and repairs on said property, and for all said sums as might be necessary to defray his expenses in caring for said property and managing said trust, together with such sums as might reasonably be required to provide a living for himself and wife until his death, which said surplus sum was to be placed at interest for the benefit of appellees and the appellant Martha P., who alone are entitled to share therein. (2) That the parting of the \$1,500 by him to his co-appellant, and her retention thereof, and the investment thereof by her in real estate, the title to which was taken in her own name, was and has been ever since continuously held adversely to appellees, in violation of said trust and the agreement declaring the same, and that said real estate ought to be held and preserved for the benefit of the the appellees and the appellant Martha P. Case. (3) That the appellant John W. Case ought to be removed as such trustee, and a successor to him should be appointed, and that the title to the real estate described in finding number fifteen, to wit, the real estate purchased with the trust funds, the title to which was taken by the appellant

Martha P., ought to be vested in such trustee for the purposes of such trust. (4) That the appellees ought to recover from the appellants their costs, etc.

The decree entered by the court on the special findings and conclusions of law was to the effect that John W. Case should be removed as trustee, and that James P. Stunkard be appointed in his stead. The latter was to execute a bond in the sum of \$3,000, and he was "hereby vested as such trustee with all of the title of the defendants Martha P. Case and John W. Case, in and to the following described real estate in Vigo county, Indiana, to wit." [Description of the real estate which is referred to and described in special finding number fifteen.] Said trustee was ordered to take charge of said real estate and collect all rents and profits and income therefrom, as well as from all of the real estate which was conveyed to the several appellees in 1891. From the moneys so received he was directed to pay the expenses of the trust, all sums required for the proper preservation of the property, all taxes and assessments and the reasonable living expenses of appellants while appellants should remain husband and wife, and place the remainder, if any, at interest for the benefit of appellees and the appellant Martha P. Case, etc.

Appellants' motion for a *venire de novo* was based upon three grounds: (1) That the special findings were so defective, uncertain and ambiguous that no judgment

5. could be rendered thereon; (2) that the special findings do not assess appellees' damages; (3) that the findings contained the evidence and not facts established by the evidence. We do not think this motion is well taken, for the special findings follow the theory of the complaint, and substantially find all of the material facts as disclosed by the evidence. There was no error in overruling the motion.

Appellant's motion for a new trial contains eighteen reasons: (1) That the decision of the court is contrary

to law. (2) That the decision of the court is not sustained by sufficient evidence. From the third to the eighteenth reasons, inclusive, the motion goes to the sufficiency of the evidence to sustain each specific finding. There is evidence in the record supportive of each of the several specific findings, and, this being true, we are not authorized to disturb the judgment below.

Keeping in mind that this is not an action to set aside a conveyance as fraudulent, we are inclined to the view that the court's third conclusion of law is erroneous,

7. because it is without the issue. It goes to the extent of declaring that the title to the real estate, which the court found had been purchased with trust funds, and the title to which was taken in the name of the appellant Martha P., should vest in the trustee for the purposes of the trust. Appellees in their complaint go only so far as to assert that they are entitled to a lien against said real estate so held by the appellant Martha P. to secure to them the payment of their pro rata interest therein. The third conclusion of law upon this question is not, therefore, within the issues, and is erroneous.

The judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law in harmony with this opinion.

WILLIAMS ET AL. v. KETCHAM.

[No. 5,598. Filed March 16, 1906.]

ESTOPPEL. — Misrepresentations. — Sales. — Mortgages. — Deeds. — Fraud.—A landowner is not estopped from denying the validity of a mortgage where he in good faith represented to the mortgagee's attorney that he had sold to a third party his farm and such attorney afterward made and delivered to such third party the deed to be executed by the landowner to such third party, which deed was returned by such third party with the landowner's name and notary's certificate forged thereon, and the mortgagee loaned the money to such third party in good faith thinking the deed genuine.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Suit by Silas M. Ketcham against Aramittie Williams and another. From a decree for plaintiff, defendants appeal. *Affirmed*.

W. R. Gardiner, *C. G. Gardiner* and *T. D. Slimp*, for appellants.

Ogden & Inman and *C. K. Tharp*, for appellee.

COMSTOCK, J.—This suit was instituted by the appellee against appellant Aramittie Williams and her co-appellant Cramer, to quiet title to real estate. The issues were joined and the cause tried upon the first paragraph of the complaint, which was an ordinary short form to quiet title, and the answer of Williams thereto by general denial. The law stated thereon, and decree entered in behalf of appellant Williams special findings were made, conclusions of law stated thereon, and decree entered in behalf of appellee against appellant Williams and co-appellant Cramer, quieting the title to the real estate in question and setting aside the mortgage alleged to have been executed by Cramer to Williams.

The errors relied upon for a reversal are that the court erred in its conclusions of law one and two and each of them separately and severally.

The special findings show that the defendant Aramittie Williams is a widow, and for many years has been a resident of the city of Washington, Daviess county, Indiana; that Milton S. Hastings is and has been for eighteen years an attorney at law in good standing and that his law office during all of said time has been situated in the city of Washington, in said county and State; that said Aramittie was appointed administratrix of her husband's estate, and she retained said Hastings as her attorney in the settlement of said estate, and he was also her personal attorney and legal advisor; that the plaintiff and the defendant George Cramer are and ever were strangers to the defendant

Aramittie Williams, and that said Aramittie Williams, at the time of the occurrences that are hereafter found to have taken place, had no personal knowledge of the location or value of said real estate, and that the plaintiff and the location of said real estate were, at the time of the occurrences hereinafter found, well known to her attorney, and that said defendant Cramer was a stranger to the plaintiff and to said attorney, except as shown by the facts hereinafter found; that the defendant George Cramer was a man apparently about forty-five years of age and of respectable appearance, and whose demeanor and appearance were those of a business man and a prosperous farmer; that on October 22, 1903, Stanley B. Johnson was a regularly appointed and acting notary public within and for said county and State, whose office as such was situated at the town of Elnora, in said county and State, and about three miles from said real estate, and that said real estate was of the value of \$8,500; that a few days prior to October 20, 1903, the defendant George Cramer visited the plaintiff at his farm, described in the first paragraph of the complaint, and that was the first time that he and the plaintiff ever met; that said Cramer again visited the plaintiff at his farm, and as a result of negotiations between them, they entered into a parol agreement by which it was agreed between them that said Cramer was to pay him \$9,000 in cash for his said farm; that said Cramer on October 17, 1903, visited said city of Washington, and was there introduced to said Hastings by William Beck as the purchaser of plaintiff's farm, and said attorney was then informed by said Beck that said Cramer wanted to borrow \$2,500, and give a mortgage on said farm to secure the payment of said loan, whereupon said attorney informed them that he had a client who might make such a loan, and that he would let them know on the following Monday, all of which took place without plaintiff's knowledge; that on the following Tuesday, October 20, 1903, the plaintiff and said Cramer went

to the office of said attorney together, when and where the plaintiff said to said attorney, referring to said Cramer: "This is Mr. Cramer. I have sold him my farm, and he wants to borrow \$2,500 on it;" that the attorney informed the plaintiff and the defendant Cramer that his client would loan \$2,500 on the farm, but that she would require an abstract of the title thereof showing the same to be good; that the plaintiff then produced an abstract of title to said farm, bringing the same down to the time of the plaintiff's purchase thereof, and employed said attorney to complete the same, and the attorney informed them that the abstract would be completed on Thursday, October 22; that on October 22, 1903, said Cramer, by himself, went to the office of said attorney, when he was informed by him that the title to said real estate was good, and that his client was ready to close up the loan; that said Cramer then requested said attorney to write a deed for the plaintiff and his wife to execute to him for said real estate, saying that he would take the same out to the plaintiff and procure its execution, and return the following day and close up the loan, whereupon said Hastings wrote said deed and gave the same to said Cramer, who went away with the same; that on said October 22, said Cramer wrote a letter to the plaintiff informing him that he would call at the farm on the following Monday, October 26, and close up the deal, which letter was received by the plaintiff at Elnora on October 22, but said Cramer never went to the plaintiff's home after writing said letter, and that the writing of said letter by said Cramer and the receipt thereof were unknown to the appellant and her attorney until November 5, 1903; that on October 23, 1903, said Cramer returned to the office of appellant's attorney with the deed that had been written as aforesaid, bearing the forged names of the plaintiff and his wife thereto, and a forged certificate of acknowledgment by them before said Stanley B. Johnson as notary public, whose name and seal were attached thereto,

with a correct statement of the time when the commission of said notary public would expire; that there was nothing in the appearance of the deed calculated to excite suspicion with respect to its genuineness in the mind of a cautious lawyer or person; that it was immediately thereafter duly recorded in the proper record of said county, whereupon said Cramer executed a mortgage on said real estate to the defendant Aramittie Williams to secure the payment of a note in her favor then executed by him to her for \$2,500, said note and mortgage having been drawn up by said attorney at the request of said Cramer, which mortgage was duly recorded in the mortgage records of Daviess county, and said Aramittie Williams at the same time gave to said Cramer her check for \$2,500 on the People's National Bank of the city of Washington, and which, upon presentation of said check, said bank paid to him and charged the same to her account; that immediately upon the receipt of said money said Cramer left said city and county for parts unknown to said attorney and to the parties to this action, and his whereabouts is still unknown to them; that the plaintiff did not inform or notify said attorney nor said Aramittie Williams that he had not sold his farm to said Cramer, after having informed said attorney on October 20 that he had done so, nor communicate with them, or either of them, until November 5; that said Cramer has no property or means in said county or State; that said attorney, before the consummation of said loan, communicated to said Aramittie Williams all of said facts relating to the sale of said real estate by the plaintiff to said Cramer; that said attorney and said Aramittie Williams in all that they each did in relation to and in effectuating said loan acted in good faith and in the belief that said deed was the genuine deed of plaintiff and his wife; that said sum of \$2,500 has not, nor has any part thereof, been repaid to the defendant Aramittie Williams; that said Aramittie Williams at the time of said transaction

was unused to business transactions; that all through the month of October, 1903, and for a long time theretofore and ever since, there was and is a line of railroad, telegraph and telephone between said city of Washington and the town of Elnora, and that on said railroad there has run during all of said time two passenger-trains each way each day between said city of Washington and the town of Elnora, all of which trains carry United States mail, and at each of which city and town there was a station on said railroad and public telegraph and telephone offices; that when the plaintiff employed said Hastings to complete said abstract he agreed to pay him therefor a sum not to exceed \$4 when the same should be completed, and that when the defendant Cramer went to the office of said Hastings on October 22, 1903, he paid to said Hastings said sum of \$4, and informed him at the same time that Ketcham had sent the money by him (said Cramer) to him (said attorney) as he (said Ketcham) could not come down on that day and at the same time said Cramer required of said attorney a receipt of the payment of said money for said Ketcham; that appellee obtained title to the real estate by purchase and deed in the month of September, 1899; that before October 22, 1903, and after the defendant had entered into negotiations with said attorney to secure a loan of \$2,500, the defendant Aramittie Williams instructed her said attorney to make a loan of her money to said Cramer upon the plaintiff's said real estate when the abstract of title thereto was brought down; that on October 22 the appellant and said attorney knew that appellee and wife had not yet executed a deed to Cramer; that the defendant Aramittie Williams was induced to give said check for \$2,500, to said Cramer and to accept said note and mortgage from him, in reliance upon the fact that the deed, delivered by said Cramer, and which he and said attorney caused to be filed for record in the office of the recorder of said Daviess county, as above found, was made in good

faith, and that it conveyed the title to the plaintiff's real estate to said Cramer, and from the further fact that defendant Ketcham had said that he had sold his farm to Cramer; that at no time during the negotiations of said Cramer for said loan of \$2,500 from the defendant Aramittie Williams did she or said attorney ever make any inquiries of said Cramer as to his financial condition, or as to whether or not he had paid the plaintiff for his said real estate; that the deed dated October 22, 1903, and which said Cramer and said attorney caused to be filed for record, as above found by the court, was never executed by the plaintiff and his wife, Emma Ketcham, or by either of them, and was never executed by any other person for them, or either of them, with their consent or knowledge, but that said deed was falsely, fraudulently and feloniously forged by said Cramer for the purpose of fraudulently procuring said sum of \$2,500; that the certificate of acknowledgement annexed to said deed was never made by said Stanley B. Johnson, but that said certificate was also forged by said Cramer in the same manner as said deed and for the same purpose; that the defendant Cramer never at any time paid the plaintiff any money for any purpose; that there was no communication between the appellant, said attorney and the appellee after October 20 until November 5, 1903; that said attorney prepared the papers in the matter of making the loan in good faith and as a friendly aid to appellant Williams; that on October 20, 1903, said attorney was acting as agent and attorney for the defendant Aramittie Williams for the purpose of making said loan of \$2,500 for her to said Cramer, and that he continued to act as her agent and attorney for that purpose up to and including October 23, 1903; that while the plaintiff was at the office of said attorney on October 20, 1903, and that from that time until October 26, 1903, the plaintiff believed in good faith that if the title to his said real estate should prove to be all right, when brought down to date,

said Cramer intended to purchase and accept a deed of conveyance for the same from the plaintiff and his wife, and to pay the whole of the consideration therefor, amounting to the sum of \$9,000, upon the delivery of said deed to him by the plaintiff; that the plaintiff never had any knowledge or information about the recording of said forged deed dated October 22, 1903, or about the execution of said note and mortgage by said Cramer, until November 5, 1903, and that the plaintiff never had any information or knowledge about the recording of said deed and mortgage, or either of them, as above found, until November 5, 1903; that in all the negotiations of the plaintiff with the defendant Cramer and with said attorney said plaintiff acted in good faith, and did not by anything that he said or did intend to mislead or deceive any person to such person's detriment or injury; that all negotiations and communications that were had between the defendant Cramer and said attorney, and all business transacted by them after October 20, 1903, was carried on and done without the knowledge or consent of the plaintiff; that the defendant Cramer was a stranger in Daviess county, Indiana, while he was negotiating for the purchase of the plaintiff's said real estate, and while negotiating for and securing the loan from the defendant Aramittie Williams, and was a common swindler, and as soon as he had secured the money on said loan of \$2,500 he at once fled to parts unknown, and his whereabouts has ever since been unknown.

Upon the foregoing facts the court stated its conclusions of law: (1) That the plaintiff is the owner of the land described in the first paragraph of his complaint, and entitled to have his title thereto quieted as against defendants; (2) that the mortgage executed by the defendant George Cramer to the defendant Aramittie Williams is not a valid lien against said real estate, and is a cloud upon plaintiff's title, and ought to be removed.

The two separate conclusions of law may be properly considered together. That the deed from appellee and wife was a forgery there is no question. A mortgage resting upon a forged deed can convey no rights, unless it be upon the grounds of estoppel. It is argued in this case that the appellant Williams, a good-faith mortgagee, was induced to accept a mortgage as security for a loan, upon the statement of the owner of the lands that he had sold them to the proposed mortgagor, made to the mortgagee with the knowledge of the application by such proposed mortgagor for the loan, and that the appellee is estopped from denying the validity of the mortgage, even though at the time of the statement he had not executed a deed for the lands to such proposed mortgagor, and subsequently such mortgagor forged the deed of the owner of the lands to himself; that appellee, after having made said statement to the agent and attorney of appellant, and knowing that at a fixed time the condition upon which the loan was to be made would be determined, rendered himself amenable to the consequences of "standing by" while the appellant, upon the faith of such statement, parted with her money; that under the circumstances it will not avail the appellee that he did not intend to deceive or mislead the appellant.

The doctrine of equitable estoppel or estoppel *in pais* involves a question of legal ethics. It lies at the foundation of morals, and "applies whenever a party has made a representation by word or conduct which he can not in equity and in conscience prove to be false." In most instances whether the acts or admissions shall operate as an estoppel must depend upon the circumstances of the particular case. In Herman on estoppel and *res judicata*, the learned author treats exhaustively the subject under consideration, and concisely states the result of his research and judgment as follows: "A party will, in many instances, be concluded by his declarations or conduct which have influenced the

conduct of another to his injury. But in the application of this principle with respect to the title to real property, it must appear, first, that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; second, that he made the admission with intent to deceive, or with such culpable and careless negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge; and further, that he relied directly on such admission, and will be injured by allowing its truth to be disproved." 2 Herman, Estoppel and Res Judicata, §948.

The expressions of Pomeroy and other text-writers are to the same effect. 2 Pomeroy, Eq. Jurisp. (3d ed.), §807, and 2 Herman, Estoppel and Res Judicata, §933, in substance say that while it is well settled that the owner of land may, by acts *in pais* preclude himself from asserting his legal title, it must be obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is contrary to the letter of the statute of frauds, and it would greatly tend to the insecurity of title if they were allowed to be affected by parol evidence of light or doubtful character. Citing *Storrs v. Barker* (1822), 6 Johns. Ch. *166.

Applying the law to the facts specially found (1) was appellee apprised of the true state of his title? He certainly was, and made the statement, as shown by all the circumstances under which it was made, as meaning that he had negotiated its sale. (2) Did he make the statement with the intent to deceive, or with such culpable and careless negligence as to amount to constructive fraud? The court finds that in all the negotiations of the plaintiff with the defendant Cramer and with Hastings, said appellant's attorney, the plaintiff acted in good faith, and did not by

anything that he said or did intend to mislead or deceive any person to such person's detriment or injury; that all negotiations and communications that were had between the defendant Cramer and said attorney, and all business transacted by them after October 20, 1903, was carried on and done without the knowledge or consent of the plaintiff. (3) Was the appellant Williams destitute of all knowledge of the true state of the title, or of all means of acquiring such knowledge, and did she rely directly on said statement? The court finds that appellee on October 20, 1903, made the statement that he had sold his farm to Cramer; that on October 22, 1903, appellant Williams and her attorney both knew that appellee and wife had not conveyed the real estate in question to Cramer; that the loan was not made to Cramer until October 23, 1903. These findings are conclusive of the proposition that said appellant's attorney knew that when the appellee said he had sold his farm to Cramer that it was not true, and she and her attorney could not have relied upon that statement in making the loan. In Pomeroy, Eq. Jurisp. (3d ed.), §810, it is said: "The truth concerning these material facts must be unknown to the other party claiming the benefit of the estoppel, not only at the time of the conduct which amounts to representation or concealment, but also at the time when that conduct is acted upon by him. If, at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he can not claim to have been misled by relying upon the representation or concealment." Citing *Irving Nat. Bank v. Alley* (1880), 79 N. Y. 536, 540; *Pulsford v. Richards* (1853), 17 Beav. 87; *Lefever v. Lefever* (1864), 30 N. Y. 27; *Horn v. Cole* (1868), 51 N. H. 287, 12 Am. Rep. 111.

The findings show that appellant Williams had the means by which, with reasonable diligence, knowledge of the truth could have been ascertained. To quote from said appellant's brief: "In common parlance the word 'sold' does not necessarily include the idea that the necessary writing has been executed to transfer the legal title, but rather that the terms and condition of the sale have been agreed upon. In this instance the clear idea involved in the statement was that he (Ketcham) was ready to execute, if he had not already executed, a deed to Cramer, when arrangements should be made for the loan." It is clearly manifest from the findings, and the facts in connection therewith, that, at the time the statement was made, being the only time until after the consummation of the loan when the appellee had any conversation with appellant's counsel, it was understood by all the parties that appellee had made no conveyance. Appellee's statement did not mislead because of the facts and circumstances connected therewith, and it ought not, therefore, to estop him in asserting his title. We have not taken up each point presented in the able briefs of counsel, and do not refer to some of the authorities cited, because the references to Herman and Pomeroy, *supra*, cover the questions involved. But we have set out substantially the special finding of facts, and have endeavored to apply the law applicable thereto. We regret that so wicked a fraud should go unpunished, but are of the opinion that the conclusions of law are warranted by the facts found.

Judgment affirmed.

WILEY, J.—I concur in the conclusion.

CONCURRING OPINION.

ROBY, C. J.—The representation by appellee that he had sold his farm, as made and understood, was true. He did not intend to include, nor was he understood as including, an assertion that he had transferred title. Evidence of

such transfer was furnished by a forged deed, for which appellee was in nowise responsible. He does not now have occasion to deny the truth of the statement made by him that he had sold the farm, and there is, therefore, nothing upon which to base an estoppel. For this reason alone I concur in the affirmance of the judgment.

COLUMBIAN ENAMELING & STAMPING COMPANY
v. BURKE.

[No. 5,625. Filed March 27, 1906.]

1. MASTER AND SERVANT.—*Negligence.—Works, Ways and Machinery.—Duty to Keep in Repair.*—The master is liable to his servant for injuries caused by such master's failure to exercise ordinary care in keeping free from defects his works, ways and machinery. p. 520.
2. PLEADING.—*Complaint. — Notice. — Constructive.—Defects.—Master and Servant.*—A complaint by the servant against the master alleging that the master had notice of the defects and the servant had not is sufficient, and such allegation includes actual and constructive notice. p. 521.
3. MASTER AND SERVANT.—*Latent Defects.*—Reasonable care requires the master, but not the servant, to search for latent defects. p. 521.
4. PLEADING.—*Master and Servant.—Assumption of Risk.—When Special Allegations Control General.*—The special allegations in an action by the servant for injuries caused by the master's negligence will not control general allegations of non-assumption of risk unless the assumption can be held as a matter of law from the special allegations. p. 522.
5. MASTER AND SERVANT.—*Works, Ways and Machinery.—Safety.*—The servant has the right to rely upon the safety of the works, ways and machinery unless defects are obvious. p. 522.
6. APPEAL AND ERROR.—*Weighing Evidence.—Master and Servant.—Negligence.—Question for Jury.*—Where the evidence is conflicting, in an action by the servant against his master for damages caused by such servant's attempting to tilt a large bottle of acid so that a truck could be placed under it and while tilting it the defective cleat broke, causing the bottle to fall and the acid to splash, some of it striking him in the face and eyes and causing injuries, the question of negligence is for the jury and its verdict will not be disturbed on appeal. p. 523.

Columbian Enameling, etc., Co. v. Burke—37 Ind. App. 518.

From Clay Circuit Court; *Presley O. Colliver*, Judge.

Action by Charles O. Burke against the Columbian Enameling & Stamping Company. From a judgment on a verdict for plaintiff for \$1,091.66 2-3, defendant appeals. *Affirmed.*

S. M. McGregor and *Lamb, Beasley & Sawyer*, for appellant.

A. W. Knight, J. O. Piety and *George A. Knight*, for appellee.

WILEY, J.—Appellee, who was plaintiff below, recovered a judgment against appellant for personal injuries received while in its employ, alleged to have resulted from its negligence. The complaint was in a single paragraph, to which a demurrer was addressed and overruled. Answer in denial. Trial by jury, resulting in a general verdict for appellee. Appellant's motion for a new trial was overruled. At the conclusion of the evidence appellant moved that the court instruct the jury to return a verdict in its favor, and this motion was also overruled.

Overruling the demurrer to the complaint and the motion for a new trial are assigned as errors.

The complaint alleges that appellant was in the business of manufacturing enameled ware; that at and prior to June 24, 1903, appellee was in appellant's employ "in and about the manufacture of its goods and wares;" that in the process of such manufacture the appellant immersed its goods in their unfinished state in certain dangerous acids, contained in large tanks; that said tanks were supplied with acids from large bottles; that about the bottles was constructed a framework or crate of wood; that the bottles containing the acid were conveyed to the tanks by means of trucks; that in loading the bottles upon the trucks it was necessary to take hold of the framework about the bottles, and by means thereof tip the bottles to one side, so as to permit the truck to pass under and receive them; that it was one of appellee's duties to aid his fellow workmen in

holding bottles filled with acid in the loading of the bottles upon the trucks preparatory to their being transferred to the tanks; that on the date last named, while appellee was in the performance of his duties, and in the act of tipping one of said bottles filled with acid, so as to permit the truck to pass under and receive it, he had hold of the framework about it, and while so holding to the framework it broke and gave way, causing the bottle to tip backward and to throw out a large amount of acid, which struck appellee in the face and eye, by which he was severely injured; that the framework gave way because it was defective and insecure and insufficient in strength to withstand the handling of the bottles; that the accident was occasioned because of the defective condition of said framework, without any fault on the part of appellee, and while he was exercising due care and caution. It is further alleged that appellee had no knowledge or notice of the insecure condition of the framework about the bottle, and could not have ascertained the same by the exercise of ordinary care; that appellant had notice of the defective condition, or could have had by the exercise of ordinary care; and that appellee's injury was due to appellant's negligence as aforesaid.

The objections urged to the complaint are (1) that it shows that the injury of which appellee complains was the result of a risk assumed by him; (2) that the general allegation in the complaint of want of knowledge on appellee's part of the defective and insecure condition of the crate is overcome by the specific allegations of the complaint showing knowledge on his part, or, that he could have known by the exercise of ordinary care.

We do not think that either of these objections is well taken. The law is well settled that it is the duty of a

master to exercise ordinary care and diligence in

1. providing safe and suitable tools and appliances to servants who are engaged in his service, which will be safe for the servants to use in the discharge of their

Columbian Enameling, etc., Co. v. Burke—37 Ind. App. 518.

duties to the master, pursuant to the contract of employment. As was said by this court in the case of *Baltimore, etc., R. Co. v. Amos* (1898), 20 Ind. App. 378: "It is also the master's duty * * * to exercise a reasonable supervision over such tools and to exercise ordinary care to keep them in safe condition for the use of the servant. * * * The master is required to take notice not only of the deterioration of tools and appliances by continued use, but also of such deterioration by natural or ordinary decay as may be discovered by reasonable inspection, in any material which may be provided by him as tools or as parts thereof. The servant has a right to rely upon the master's observance of these requirements and performance of these duties." *Island Coal Co. v. Risher* (1895), 13 Ind. App. 98; *Salem Stone, etc., Co. v. Griffin* (1894), 139 Ind. 141; *Louisville, etc., R. Co. v. Hanning* (1892), 131 Ind. 528, 31 Am. St. 443.

It has also been held that notice on the part of the master of defects in machinery or appliances, and want of notice on the part of the servant, may be alleged in general

2. terms, and such allegations will include both actual and constructive knowledge. *Louisville, etc., R. Co. v. Miller* (1895), 140 Ind. 685; *New Kentucky Coal Co. v. Albani* (1895), 12 Ind. App. 497.

An averment in the complaint that the servant did not know of such defect or danger is sufficient as a matter of pleading to rebut or deny not only actual knowledge, but also implied or constructive knowledge or notice. *Baltimore, etc., R. Co. v. Roberts* (1903), 161 Ind. 1; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297; *Chicago, etc., R. Co. v. Richards* (1901), 28 Ind. App. 46.

It has been held that reasonable care on the part of the master demands inspection and search for latent defects, while reasonable care on the part of the servant

3. requires attention and observation of open or obvious defects and perils. *Louisville, etc., R. Co. v. Quinn* (1896), 14 Ind. App. 554.

In the case of the *City of Wabash v. Carver* (1891), 129 Ind. 552, 13 L. R. A. 851, it was held that special allegations will not control general allegations of non-

4. assumption of risk unless it can be held as a matter of law that plaintiff assumed the risk. See, also, *Cincinnati, etc., R. Co. v. Darling* (1892), 130 Ind. 376; *Salem Stone, etc., Co. v. Griffin*, *supra*.

We think it may be stated as a general rule that a servant may rely upon the safety of such implements as are provided by the master for his use in the master's

5. service, unless their defectiveness is open to the observation of an ordinarily prudent man. *Baltimore, etc., R. Co. v. Amos*, *supra*; *Arcade File Works v. Juteau* (1896), 15 Ind. App. 460. A servant engaged in his master's service has a right to presume that his employer has done his duty and furnished appliances which render the work reasonably safe. *Indiana, etc., R. Co. v. Bundy* (1899), 152 Ind. 590; *Brazil Block Coal Co. v. Gibson* (1903), 160 Ind. 319, 98 Am. St. 281; *Pittsburgh, etc., R. Co. v. Parrish* (1902), 28 Ind. App. 189, 91 Am. St. 120; *Chicago, etc., R. Co. v. Lee* (1902), 29 Ind. App.

480. As a general rule it may be stated that an employe is not required to make inspection of the tools, appliances, etc., which his master has furnished him. The law does not place upon him that burden or responsibility. The law goes only so far as to lay upon him the duty to observe defects that are open, visible and apparent. *Linton Coal, etc., Co. v. Persons* (1894), 11 Ind. App. 264; *Gould Steel Co. v. Richards* (1903), 30 Ind. App. 348. Applying these settled rules to the facts stated in the complaint, we are clearly of the opinion that the objections urged by appellant's counsel can not be maintained. There was no error in overruling the demurrer.

Two of the reasons assigned for a new trial are (1) that the verdict was not sustained by sufficient evidence; and (2) that it was contrary to law. Under the propositions

relied upon for a reversal counsel for appellant assert that the evidence fails to establish negligence on the part of appellant, and that there is "no evidence to support the verdict," and hence it is not sustained by sufficient evidence and is contrary to law. In their argument, however, counsel do not discuss these propositions, and say that they do not care to discuss them, and only call our attention to them and the authorities cited under them.

At the conclusion of the evidence appellant moved that the court give a peremptory instruction in its favor. If

appellant was entitled to such instruction it was

6. error to refuse it, and in reviewing the question

thus raised the sufficiency of the evidence to sustain the verdict may be considered. To determine this question it is important to have before us the facts descriptive of the manner in which appellee was injured. The acid used by appellant was put in tanks or vats from large bottles. These bottles were incased in wooden crates, with cleats attached for handling the same. The crates containing the bottles were conveyed to the vats by means of a truck. Appellee and a co-employee went to get a bottle of acid to put in the vat. Appellee went to where the bottles were, and was moving one of the crates out, and went to tip it up so his co-employee could put the truck under it, and while in the act of tipping it the cleat came off, the bottle fell back to the ground, and the acid flew in his face, etc. The accident occurred between 11 and 12 o'clock at night, and the nearest light was an electric light forty or fifty feet from where he was injured.

As stated by appellee: "I tipped the crate over so the truck could be run under it. The cleat gave way, and the bottle fell back, and the acid flew in my face and eyes, and after that I could not see anything. I never saw the box [crate] again. * * * The cleat appeared to be sound when I took hold of it. I did not know it was unsafe or loose. It appeared to be all right."

The co-employee Zollinger, who was assisting appellee, stated in one part of his examination that the cleat broke and came off, and in another that it did not. Appellee's father testified that he was working within forty-five or fifty feet of his son when he was injured, and went to him in three or four minutes. He stated that he saw the bottle and crate the next evening, and examined them; that he found one cleat off on the ground; that it looked rotten; that nails were sticking in it; some of the nails were in the box, or crate, and some in the cleat; that the cleat was rotten, about two feet long, three or four inches wide, and one inch thick, and lying on the ground beside the bottle. He also testified that he did not see any other box "around there with cleats off." On behalf of appellant witnesses testified that on the following day they found one of the bottles moved out from the others; that the cork was out; that the acid had spilled; that the cleats were on the crate; and they saw no loose or rotten cleats.

This is all the evidence that throws any light upon the manner in which appellee was injured, and upon this evidence counsel for appellant insist that it was the duty of the court to direct a verdict. We must determine from these facts whether as a matter of law they acquit appellant of actionable negligence. If they do, then it was error to refuse the instruction. But, under the evidence before us, the question of appellant's negligence and appellee's freedom from contributory negligence becomes a mixed question of law and fact. We can not say that the evidence is without conflict. On the contrary, upon the vital question at issue, there is a sharp conflict. This being true, that question should have been submitted to the jury under proper instructions.

Counsel for appellant make some effort to discredit the evidence of appellee's father, upon the theory that it is not shown that the crate and bottle which he saw the next day, and with the cleat off the crate, were the ones that

appellee was handling when he was injured. They urge that this fact is emphasized by the evidence of other witnesses who say that they did not, upon the following day, observe any such conditions. Appellee's father was asked and he answered this question: "If you saw this bottle and crate state that fact to the jury and when you saw them? A. I saw them the next day." Under this evidence it was a question for the jury to determine whether he saw the identical crate and bottle. It was also the province of the jury to determine from the conflicting evidence whether the bottle fell back by reason of the cleat's breaking, and whether it was rotten. Where the facts are controverted, or where negligence may or may not be inferred from facts proved, the question of negligence must be submitted to the jury. *City of Indianapolis v. Mitchell* (1901), 27 Ind. App. 589, and authorities cited; *Young v. Citizens St. R. Co.* (1897), 148 Ind. 54, and authorities cited.

There is evidence that the accident was caused by the cleat's coming off of the crate, and that the reason it came off was because it was rotten. Appellee testified that it looked all right to him. He was not bound to make an inspection of it, for he was only chargeable with the duty of observing defects that were visible, open and apparent. *Linton Coal, etc., Co. v. Persons, supra*; *Gould Steel Co. v. Richards, supra*; *Baltimore, etc., R. Co. v. Amos, supra*. If the cleat, or the crate, was defective, by reason of which the former came off, the defect might have been discovered by a reasonable inspection, and, as we have seen, this duty does not rest upon the servant, but upon the master. *Louisville, etc., R. Co. v. Quinn* (1896), 14 Ind. App. 554.

The rule is firmly established in this jurisdiction that where there is a conflict in the evidence, upon a material question at issue, it is an invasion of the province of the jury for the trial court to direct a verdict. This court, in *Hamilton v. Hanneman* (1898), 20 Ind. App. 16, said: "It is within the power of the trial court to control or direct

a verdict by instructions, only where there is a total absence of evidence upon some essential issue, or where there is no conflict, and the evidence is susceptible of but one inference." The evidence before us, as to the essential issues for determination, is conflicting. It was the sole province of the jury to determine its probative force, as well as to determine what facts it established, and what legitimate inferences were deducible therefrom.

There was no error in refusing to give the instruction. The judgment is affirmed.

HOFFMEYER v. THE STATE.

[No. 5,951. Filed March 27, 1906.]

1. **CRIMINAL LAW.—Statutes.—Factory Act.—Reporting Accidents.—Interurban Railroads.—To Whom Statute Applies.**—Section eight of the factory act (Acts 1899, p. 231, §7087h Burns 1901), providing that any person having charge of a manufacturing establishment shall, within forty-eight hours after the happening of any accident therein, report same to the state factory inspector, applies to the superintendent of a street railroad company's repair shop where its cars are repaired and other work done for the use of such company by persons "employed for hire," although nothing is made for sale therein. p. 527.
2. **STATUTES.—Construction.—Factory Act.**—In construing sections one and eighteen of the factory act (Acts 1899, p. 231, §§7087a, 7087r Burns 1901), the court will look at the general purpose of the statute and the grievances which it was designed to prevent. p. 531.
3. **SAME.—Criminal.—Strict Construction.**—While statutes for the punishment of crimes are strictly construed, still, they should be construed to carry out the evident purposes for which they were enacted. p. 532.

From Criminal Court of Marion County (34,843);
Fremont Alford, Judge.

Prosecution by the State of Indiana against Fred Hoffmeyer. From a judgment of conviction, defendant appeals.
Affirmed.

F. Winter, W. H. Latta, G. W. Payne and L. H. Oberreich, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley, L. G. Rothschild, W. C. Geake and A. R. Hutchinson*, for the State.

COMSTOCK, J.—The affidavit upon which the prosecution was founded was filed by David F. Spees, chief deputy state inspector of the department of inspection of the State of Indiana, before William C. Smock, a justice of the peace in Center township, Marion county, of said State. It is alleged that Fred Hoffmeyer was superintendent of and in charge of a workshop for the repair and manufacture of articles, and that Henry Courtat was foreman of said shop; that the shop was owned and controlled by the Indianapolis Traction & Terminal Company, a corporation controlling and conducting a street railway in the city of Indianapolis, Marion county, Indiana; that on or about April 24 an accident happened in said shop to M. L. Weaver, and that said Fred Hoffmeyer and Henry Courtat failed to report the accident, in writing, within forty-eight hours of its happening, to the chief inspector of the State of Indiana. The defendants moved to quash the affidavit, which motion was overruled. The motion to quash the affidavit as to Henry Courtat was sustained. The case was tried before Justice of the Peace Smock, and the defendant was found guilty and fined \$1 and costs. An appeal was taken from said judgment to the Marion Criminal Court, and there the case was submitted to the court without a jury, upon an agreed statement of facts, the defendant Fred Hoffmeyer pleading not guilty. Upon the facts submitted the court found the defendant guilty as charged and fixed his fine at \$5.

Appellant contends that the Indianapolis Traction & Terminal Company is not engaged in manufacturing, and for that reason the judgment should be reversed.

1. This question is presented by the assignment of errors and discussed by counsel. The affidavit is

based upon section eight of an act concerning labor, etc. Acts 1899, p. 231, §7087h Burns 1901. The facts agreed upon are substantially as follows: The defendant Fred Hoffmeyer was, on April 24, 1905, a superintendent of a certain repair and workshop in the city of Indianapolis, Marion county, Indiana. On said day there was an accident in said shop whereby injury was done to one of the employes therein, named Monroe L. Weaver. Said Hoffmeyer did not within forty-eight hours of the time of the accident, or since, report the same to the chief factory inspector of the State of Indiana. Said shop is the property of, and was owned and operated by, the Indianapolis Traction & Terminal Company, a corporation organized under the laws of the State of Indiana, for the incorporation of street railway companies, in pursuance of the terms and provisions of the act for the incorporation of street railways as set forth in §5450 Burns 1901, Acts 1901, p. 119. Said Indianapolis Traction & Terminal Company is not organized under any part or any of the provisions of the manufacturing and mining act, or the voluntary associations act. Neither said Indianapolis Traction & Terminal Company, any employe thereof, nor any person working in or about said repair and workshop in which said accident happened, is engaged in the manufacture of any article whatever, unless the following is manufacturing within the terms of the statutes. Said company in said repair and workshop, whenever the floors in any cars become broken, does take flooring and cut the same, on circular saws, to fit, and put the same in place on the floors of said cars. When any of the signs on any cars are broken said company does, from lumber bought for and delivered to said shop, repair and replace the same. Said signs are repaired by taking boards and cutting out the letters with saws in said shop, then fitting celluloid and iron castings, purchased for the purpose, on the same, whereby the signs are held in place on the cars. They are then painted.

Whenever a window sash or car door is broken or needs repairs the same is fixed by putting in a new piece of lumber for that purpose and using as much of the old door or sash as is practicable. Signs for baseball, parks and band concerts are prepared in said shops as follows: Rough boards are cut in lengths of about two feet and nailed together, planed, painted, fitted on iron castings, bought for the purpose, and set temporarily in cast-iron sockets on the cars. Some others are prepared by pasting printed notices on rough boards, which are fitted in said iron castings.

There are in said shops planing machines, shapers or fizers, circular saws, band saws, rip saws, cut off saws, gig saws, jointers, lathes, mortise machines, stickers and all kinds of hand tools, said saws and machines being run by electric motor power. No article therein, or upon which any work is done therein, is sold or offered for sale, or prepared for sale, or to be offered for sale, either directly or indirectly. No mining, quarrying, laundry work, renovating, baking or printing is done in said shop or any part thereof, or on any floor of any part thereof. Said shop and every part thereof, and every tool and machine of any kind contained therein are used, and every person employed in or about the same is engaged, solely and exclusively in the repair of such other cars or other property or articles belonging to said Indianapolis Traction & Terminal Company, and are in use in such company's business of transporting passengers for hire, for the purpose of keeping said cars or other appliances in condition to carry on said business.

By section one of the act of 1899, *supra* (§7087a Burns 1901), the act is made to apply to "any manufacturing or mercantile establishment, laundry, renovating works, bakery or printing-office." By section eighteen (§7087r Burns 1901) the language in the act is interpreted to have the following meaning: "The words 'manufacturing or

mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing-office' means any mill, factory, workshop, store, place of trade or other establishment where goods, wares or merchandise are manufactured or offered for sale, or any mine or quarry where coal and stone are mined and quarried for the market, and persons are employed for hire." It will be observed that the words "mine and quarry" occur both before and after the expression "or merchandise are manufactured or offered for sale;" that the words "laundry and renovating works" precede "or other establishments," etc. It is manifest that the qualifying words just quoted do not apply to "laundry or renovating works;" in such places wares or merchandise are not manufactured or offered for sale. The word "workshop" is defined as "a shop where any manufacture or handiwork is carried on." Webster's Dict. Whether for the purpose of repair or manufacture, that is "to modify or change natural substances so that they become articles of value and use" (Anderson's Law Dict., p. 654), is not material. The words of said eighteenth section may be properly read as written: "Manufacturing or mercantile establishment, * * * bakery, or printing office." The word "and" preceding "persons are employed for hire" at the conclusion of said section is properly connected with and qualify all the places designated preceding it. The words "where goods, wares or merchandise," etc., apply to and qualify only such other places as are not otherwise therein described. We then have the statute before us, applying to a workshop where persons are employed for hire. Under this construction the mechanic working in his own shop or the farmer doing his own work or repairing, instances cited by appellant, would not come within the statute.

Baltimore, etc., R. Co. v. Cavanaugh (1905), 35 Ind. App. 32, is not applicable to this case. It is obvious from

the scope of the statute that it was the intention of the legislature by many provisions of the act to reduce the hazard of certain employment in which machinery is used. *Monteith v. Kokomo, etc., Co.* (1902), 159 Ind. 149, 58 L. R. A. 944. It limits the hours of labor for minors of both sexes; forbids the employment of children under fourteen years of age; makes it the duty of the employer to furnish contrivances for the safety of the employes, and in said section eight requires that a report be made to the state inspector of labor of all accidents or injuries to any persons on said premises, within forty-eight hours of the time of the accident. We can not admit that the legislature intended to be less mindful of the employer of hired labor in a shop where repair work only is done than when the same laborer is employed in an establishment engaged in manufacturing articles from the raw material, when in both places the same conditions exist as to machinery and the hazards encountered. It is apparent from the whole

act that the purpose of the legislature was to enact

2. a statute designed to protect the life and health of the laborer working for hire in places where dangerous machinery is used. Every legislative act must have a reasonable construction. *Potter's Dwarrris, Statutes*, 145. The intent of the legislature is to be collected from the general view of the whole act. *Potter's Dwarrris, Statutes*, 193. "In considering acts of parliament, judges are to look at the language of the whole act, and if they find in any particular clause an expression, not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act, they can collect from the more large and extensive expressions used in other parts, the real intention of the legislature, it is their duty to give effect to the larger expressions." *Potter's Dwarrris, Statutes*, 194.

The rule of strict construction applies to criminal statutes. This rule "however, whenever invoked, comes

attended with qualifications and other rules no less

3. important; and it is by the light which each contributes that the meaning must be determined.

Among them is the rule that the sense of the words is to be adopted which best harmonizes with the context, and promotes to the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention." Maxwell, *Interp. of Stat.* (2d ed.), 333.

The facts show that the principal work of the shop was in the way of repair for the purpose of keeping the cars and other appliances of the traction company in condition to carry on its business; that to an inconsiderable extent some articles were manufactured, but the shop in question is within the statute, being a workshop as defined by Webster, *supra*, and the judgment is therefore affirmed.

RAMAGE v. WILSON.

[No. 5,594. Filed March 28, 1906.]

1. **CONTRACTS.—Leases.—Ambiguous.—Gas and Oil.**—A gas-and-oil lease providing that the lessee "may cancel and annul this contract or any part thereof at any time," is ambiguous, and in construing such a lease courts will look to the nature of the instrument and the intention of the parties. p. 536.
2. **PLEADING.—Answer.—Landlord and Tenant.—Leases.—Gas and Oil.**—To a complaint for the enforcement of the provisions of a gas-and-oil lease, an answer that defendant complied with such lease as to the drilling of two wells; that he canceled said contract as to the third well by releasing six and two-thirds acres of the twenty-acre tract; that the lease provided that lessee shall have the right to "cancel and annul its contract or any part thereof at any time;" that it was understood by the parties that such lease could be canceled and annulled as to such part of the tract for each well not drilled, is bad, there being nothing in the lease to indicate a lease of a part only of

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the tract nor anything in the answer to show that the wells were put down with such end in view, or how a division could be made. p. 536.

3. **LANDLORD AND TENANT.** — *Gas-and-Oil Leases.* — *Release.* — *Parol.*—A lease granting the gas and oil under a certain tract conveys an interest in the real estate, and it can not be released by parol. p. 537.
4. **TRIAL.** — *Leases.* — *Gas and Oil.* — *Release.* — *Evidence.* — An answer to a complaint for the enforcement of the provisions of a gas-and-oil lease, that defendant had released a portion of such tract in writing and therefore owed plaintiff nothing is not supported, where the evidence showed a release signed by some person not shown to have authority from defendant, that plaintiff refused such release and that the lease granted an interest in real estate, since the release, even if authorized, did not amount to a reconveyance. p. 538.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by John W. Wilson against Samuel Y. Ramage. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Dailey, Simmons & Dailey, for appellant.

Wilson D. Lett, Thomas B. Dicken, Waldo E. Haisley and Bayless L. Guffy, for appellee.

MYERS, J.—This is an action by appellee against appellant to recover a certain sum of money alleged to be due, by reason of appellant's failure to comply with and perform a certain stipulation in a natural gas and oil lease, which stipulation reads as follows:

"Second party also agrees to drill an additional well each and every sixty days, or pay \$1 per day for each and every day's delay over that time till three wells are completed."

The complaint avers the ownership of the land in appellee, the execution by appellee of said oil-and-gas lease to Thomas McDonald, and various assignments from McDonald to appellant; the drilling of two wells on the premises; and the failure to drill a third well. Appellant answered in five paragraphs. A demurrer for want of facts

was sustained to the fifth. Replies were filed to the other paragraphs of answer, except the first, which was a general denial. The issues thus formed were tried by the court, resulting in a finding and judgment in favor of appellee for \$307.

The only errors presented for our decision are based upon the ruling of the court in sustaining appellee's demurrer to the fifth paragraph of answer and the overruling of appellant's motion for a new trial.

In part the oil-and-gas lease, made a part of the complaint, provides that in consideration of \$25 appellee granted and guaranteed unto Thomas McDonald all the oil and gas in and under a certain twenty-acre tract of land, then owned by him, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, and lessor was to have one-eighth part of all oil produced and saved from said premises. The lease stipulates that in case no well is completed within fifteen months from date of lease, lessee shall thereafter pay at the rate of \$1 per day for further delay, and also for the drilling of "an additional well each and every sixty days or pay \$1 per day for each and every day's delay over that time till three wells are completed." "Also the right to remove all its property at any time, and to cancel and annul its contract or any part thereof at any time." The conditions between the parties extend to their heirs, executors, successors and assigns. This lease was executed July 19, 1899.

The fifth paragraph of answer, in substance, after setting out the stipulations in the lease with reference to the completion of a well within fifteen months, an additional well each sixty days, the right to the use of gas, etc., and to cancel and annul the contract or any part thereof at any time, and that the conditions of the contract shall extend to their heirs, executors, successors and assigns, alleges that two wells were drilled and completed on the real estate described in the contract within the time provided for

therein, and that such wells produced oil in paying quantities; that appellee received and accepted his portion of the oil as provided in the contract; that the two wells so drilled were located on the east thirteen and one-third acres of the twenty-acre tract described in the contract, and that no well was ever drilled on the west six and two-thirds acres thereof; that at the time of the execution of the contract it was agreed between appellee and McDonald that three wells were to be drilled on the real estate described in the contract, or if three wells were not drilled and McDonald, his heirs, executors, successors and assigns, desired to hold all of said premises, \$1 per day should be paid while in default of completing wells, and it was further understood by said parties that if McDonald, his heirs, etc., desired to be relieved from the payment of said \$1 per day, that six and two-thirds acres for each well not drilled should be released and canceled, and when so canceled and annulled as to six and two-thirds acres for each well not drilled, then said McDonald, his heirs, etc., should be relieved from the payment of \$1 per day for a failure to drill and complete wells; that the parties to the lease construed the same to mean at all times, that the cancelation and annulment of said contract as to six and two-thirds acres of the described tract, should release McDonald, his heirs, etc., from such payment; that on February 15, 1901, there was no rental or penalty whatever due on said contract for the failure to drill a well on said real estate, and on that day the Emery Oil Company, being the owner of the lease at that time, by its agent, J. B. Hinkle, canceled and annulled the lease as to six and two-thirds acres off of the west end of the real estate covered by the lease, and at that time so informed appellee that the lease was annulled and canceled as to such portion of the real estate; that at that time the Emery Oil Company, by its agent, as aforesaid, canceled the following portion of the contract or lease, to wit:

“Second party agrees to drill an additional well each and every sixty days, or pay \$1 per day for each and every day’s delay over that time till three wells are completed;”

that by reason of the facts alleged in this paragraph of answer he is relieved from the payment of the same or any portion thereof sued for in this action.

The purpose of this answer is to bring before the court what the parties intended by, and the construction by them given to, the stipulation in the lease: “And may

1. cancel and annul this contract or any part thereof at any time.” This stipulation seems to be of uncertain meaning, and is certainly ambiguous. When such ambiguity arises in a contract, the courts in the construction thereof will look to the intention of the parties as evidenced from the “nature of the instrument, the conditions under which it was made, the situation of the parties, the nature of their business, the interest to be protected” (*Merica v. Burget* [1905], 36 Ind. App. 453), and the construction which may be developed by their acts and treatment of the contract.

There is nothing in the contract to indicate an intention to lease the land otherwise than as an entirety. The evident intention of the landowner in making the lease was

2. to have his land developed for oil and gas (*Gadbury v. Ohio, etc., Gas Co.* [1904], 162 Ind. 9, 62 L. R. A. 895), and to that end he stipulated for three wells, the first to be drilled within fifteen months, the other two one each sixty days thereafter, or for delay the lessee agreed to pay \$1 for each day’s delay. From the allegations in the answer it does not appear that the wells drilled were located with a view of the alleged construction placed upon the lease, or that there was any agreement as to the location of wells at all. It does allege that McDonald, his heirs, etc., should be released from the drilling of more than one well by canceling the contract for six and two-thirds acres for

each well not drilled. From what part of the real estate covered by the lease was each six and two-thirds acres to be taken? The answer does not tell. It does not allege that the parties ever agreed upon any division of the leased premises for such purpose, or that the cancelation of the lease on six and two-third acres off of the west end of the twenty-acre tract was ever considered by the parties as a privilege and option to the lessee whereby he might avoid liability on account of delay in drilling the third well. In our opinion the allegations of this answer are not sufficient to overcome the positive stipulation in the lease, and the real consideration therefor, to drill three wells or pay a certain stipulated sum per day for delay.

The answer is not sufficient for another reason. It counts upon a release by parol. All of the oil and gas underlying the twenty-acre tract was granted and

3. guaranteed unto Thomas McDonald, and by various assignments of the lease appellant became the owner of all rights guaranteed to the original lessee. A similar contract was held to import a sale of the gas and oil underlying the land. *Consumers Gas Trust Co. v. Littler* (1904), 162 Ind. 320. Gas and oil in its natural state is regarded as real estate. *Heller v. Dailey* (1902), 28 Ind. App. 555; *Shenk v. Stahl* (1905), 35 Ind. App. 493. There is no intimation from the facts pleaded in this answer that the so-called lease under which appellant is operating is insufficient to vest in him not only the right to the oil which he might mine from a particular well, but to all the oil and gas underlying the entire twenty-acre tract. He is protected in this right by a compliance with the terms and provision of the lease. *Carr v. Huntington Light, etc., Co.* (1904), 33 Ind. App. 1; *Heller v. Dailey, supra*; *Venture Oil Co. v. Fretts* (1893), 152 Pa. St. 451, 25 Atl. 732; *Heal v. Niagara Oil Co.* (1898), 150 Ind. 483. The answer now under consideration shows that the land, from wells sunk by appellant or his assignors, is producing

oil in paying quantities. Appellant is operating the wells under a right guaranteed to him by his lease. His right to the oil and gas having become vested, and such right being an interest in the land, and there being no question of abandonment in this case, a surrender of a part of such interest could not be by parol, but such surrender must be by an instrument in writing, duly acknowledged, and in compliance with the statute. §3335 Burns 1901, §2919 R. S. 1881; *Heller v. Dailey, supra*.

Appellant assigns two reason in support of his motion for a new trial: (1) The decision of the court is not sustained by sufficient evidence; (2) the decision of

4. the court is contrary to law. Appellant's fourth paragraph of answer is substantially like his fifth paragraph, except he alleges the cancelation of a portion of the leased land by an instrument in writing, and it is this written release, introduced in evidence, which he insists precludes a recovery by appellee. The written release upon its face does not appear to be the act of the owner of the lease, but the act of an agent. It does not appear that the agent at the time of the execution of the release had any authority to execute such an instrument, and thereby bind his principal. The evidence shows that at the time of the execution of the release two wells on the east two-thirds of the twenty-acre tract were producing oil, and were being operated by the lessee. The evidence also shows that such attempted partial cancelation of the lease was not with the consent of the lessor, and that he refused to accept such release, and that the same was by such agent caused to be recorded in record No. 25, page 287, of the records of Grant county, Indiana. In view of our conclusion that the lessee at that time had a vested interest in the land for the purposes authorized by the lease, and the lease itself being without a provision providing the manner of its termination or cancelation in whole or in part, under the authority of *Heller v. Dailey, supra*, such cancelation would be con-

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trolled by §§3335, 3336 Burns 1901, §§2919, 2920 R. S. 1881, and §3337 Burns 1901, Acts 1883, p. 99, §1, and therefore, under the facts here appearing, such partial release would not be effective as a reconveyance of such vested interest, and consequently would not preclude a recovery by appellee.

Judgment affirmed.

CINCINNATI, LAWRENCEBURG & AURORA ELECTRIC STREET RAILROAD COMPANY v. STAHL.

[No. 5,399. Filed December 14, 1905. Rehearing denied March 29, 1906.]

1. INTERURBAN RAILROADS.—*Acceptance of Ordinances.—Contracts.—Municipal Corporations.*—The acceptance by an interurban railroad company of a municipal ordinance, providing the rate of speed along and over the streets, constitutes a contract and such company is bound thereby. p. 542.
2. MUNICIPAL CORPORATIONS.—*Ordinances.—Speed of Interurban Cars.*—A municipal ordinance limiting the speed of interurban cars upon the street crossings to four miles per hour and between crossings to six miles per hour is not unreasonable. p. 542.
3. PLEADING.—*Complaint.—Interurban Railroads.—Negligence.*—A complaint, by plaintiff, who was riding in a wagon, alleging that defendant interurban railroad company run its car at a high and dangerous rate of speed around a street corner, thereby injuring plaintiff who was exercising due care, is sufficient. p. 543.
4. APPEAL AND ERROR.—*Record.—Bill of Exceptions.—Exhibits.*—Exhibits designated as attached to a bill of exceptions are a part of the record if they are attached to such bill preceding the authentication thereof by the judge. p. 543.
5. SAME.—*Record.—Bill of Exceptions.—Exhibits.—Statutes.*—An exhibit which is already a part of the record can be made a part of the evidence in a bill of exceptions simply by reference, but if not a part of the record, it must be authenticated as a part of the bill by the judge, and it is not sufficient to attach it as an exhibit after the judge's signature, the act of 1903 (Acts 1903, p. 338) failing to provide for such cases. p. 544.

6. **APPEAL AND ERROR.**—*Evidence Not All in Record.*—*Questions Presented.*—Where the evidence is not all in the record, all questions not affected by such omitted evidence may be considered on appeal. p. 544.
7. **SAME.**—*Instructions.*—*How Made Part of Record.*—Instructions filed with the clerk and excepted to in writing are a part of the record. p. 544.
8. **EVIDENCE.**—*Ordinances.*—*Interurban Railroads.*—*Negligence.*—In an action for damages on account of running an interurban car at a greater rate of speed than permitted by a municipal ordinance, such ordinance is admissible in evidence. p. 545.
9. **SAME.**—*Declarations.*—*Res Gestae.*—*Interurban Railroads.*—Declarations made by the motorman to the conductor of an interurban car, explanatory of a collision which had occurred immediately before, are admissible as part of the *res gestae*. p. 545.
10. **TRIAL.**—*Interrogatories to Jury.*—*Interurban Railroads.*—*Issues.*—Interrogatories requiring the jury to state in detail whether the motorman of the colliding car failed to do anything he could have done to avert such collision are properly refused where the issue was negligence in operating the car at an excessive speed. p. 545.
11. **SAME.**—*Contributory Negligence.*—*Question for Jury.*—*Appeal and Error.*—Contributory negligence is primarily a question for the jury, and where there is any evidence tending to support their verdict it will not be disturbed on appeal. p. 546.
12. **JURY.**—*Questions of Fact for.*—*Invasion of Such Right by Courts.*—Under the English and American systems of jurisprudence, questions of fact are for the jury, proper instructions being given; and an invasion of such right by the trial or appellate courts tends to arbitrariness of decisions and illogical standards. p. 546.
13. **EVIDENCE.**—*Incompetent.*—*Elicited by Appellant.*—*Objections on Appeal.*—Appellant can not complain of the admission, over objection, of incompetent evidence of its motorman's declarations after the collision complained of, when it elicited similar evidence from another witness on cross-examination. p. 547.

From Ohio Circuit Court; *George E. Downey*, Judge.

Action by Henry Stahle against the Cincinnati, Lawrenceburg & Aurora Electric Street Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

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Stanley Shaffer, Frank B. Shutts and Martin J. Givan, for appellant.

Charles J. Lang, Warren H. Hauck, Roberts & Johnston and Louis B. Ewbank, for appellee.

ROBY, C. J.—Action to recover damages on account of personal injuries alleged to have been sustained by appellee through the negligence of appellant. The amended complaint was in one paragraph, to which a demurrer for want of facts was overruled. The cause was submitted to a jury and a verdict for appellee returned, accompanied by answers to a series of eighty-five interrogatories. Appellant's motion for judgment, notwithstanding the general verdict was overruled, as was its motion for a new trial, such rulings being the basis of the assigned error. Judgment for \$2,500 was rendered upon the verdict.

It is averred in the amended complaint that Walnut and Third streets, in the city of Lawrenceburg, cross each other at right angles; that the appellant operated an electric street railroad in said city, its track being laid in Third street and turning at the intersection aforesaid into Walnut street; that it used said streets and operated its railroad by virtue of an ordinance of said city enacted in February, 1899, and extended in May, 1900, by the terms of which it was provided that no car should be run upon any street between crossings at a higher rate of speed than six miles an hour, nor over crossings at a higher rate than four miles an hour, and that a gong or other proper signal should be sounded constantly for 100 feet by cars approaching crossings. It is averred that the view of Third street from Walnut street is obstructed by buildings in the angle formed by said streets; that appellant's track curved at said crossing, one rail thereof coming within five feet of the sidewalk, and that it was impossible for a team to be driven from Walnut street upon Third street without crossing appellant's track; that appellee was riding in a wagon drawn by two horses, driven by his co-employee, along Wal-

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nut street and toward Third street, and while in the exercise of due care was injured by one of appellant's cars, which approached along Third street, and turned into Walnut street, colliding with said wagon. The negligence averred consists in the alleged operation of said car at an excessive rate of speed, in disregard of the ordinance aforesaid. It is averred that said car was run at a high and dangerous rate of speed, without signal, along said Third street and around said curve into Walnut street, injuring appellee as set out in detail, to his damage, etc.

The complaint is attacked in argument, upon the ground that it proceeds alone upon the theory that appellant's negligence consisted in the violation of said ordinance,

1. and that it is unreasonable and beyond the power of the common council and void. The averment is that the streets of said city are used and occupied under and by virtue of the ordinance named. The acceptance of the privileges conferred thereby carried with it the acceptance of the burdens imposed. One who takes the benefits secured to him by contract, can not refuse to comply with the obligations imposed upon him thereby. The street car company which seeks a franchise may accept the one granted or not, as it chooses, but, accepting it, takes subject to the conditions imposed. *Chouquette v. Southern Electric R. Co.* (1899), 152 Mo. 257, 265, 53 S. W. 897; *Bly v. Nashua St. Railway* (1893), 67 N. H. 474, 476, 32 Atl. 764, 30 L. R. A. 303, 68 Am. St. 681.

The reasonableness of a city ordinance, aside from contract relation to it, depends upon varying conditions, and, inasmuch as the primary duty of society is to pro-

2. tect the individual who has, by becoming a party to the social compact, deprived himself of the right of self-protection by the strong arm, an ordinance enacted in the discharge of such duty, so imposed, by municipalities whose officers are familiar with the conditions existing, will not be interfered with by the courts, except for good cause

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shown, and a limitation put upon the speed of heavy cars run over city streets, such as is contained in the contract ordinance pleaded, is very far from being unreasonable upon its face, or void.

The complaint was sufficient in its averments of negligence, aside from the obligations imposed by said

3. ordinance, so that there could have been no error in overruling the demurrer.

Preliminarily to a consideration of the questions argued in support of the assignment that the court erred in overruling appellant's motion for a new trial, it is nec-

4. essary to determine whether the evidence is in the record, appellee contending that it is not. A plat, the examination of the plaintiff, and a deposition appear, from the longhand report, to have been introduced, the stenographer inserting parenthetically the statement that such plat, examination and deposition are marked "exhibits A, B and C, hereto attached and made a part hereof." The bill of exceptions contains the statement that "this was all the evidence given in said cause," following which is (1) the examination of the plaintiff marked exhibit B; (2) the deposition marked exhibit C; (3) a certificate of the reporter that the foregoing typewritten manuscript is a full and complete copy of the shorthand report of the evidence given in the cause; (4) the signature and certificate of the judge authenticating; (5) exhibit A; (6) a precept for a full and complete transcript of all the proceedings; and (7) a certificate of the clerk signed and sealed. The exhibits, if made part of the record by the reference, are, in effect, incorporated therein, at the place where such reference is made. The examination and deposition are both included in the bill and must be regarded as authenticated by the signature of the judge thereto, as fully as though bodily incorporated therein at a different place. *Zeis v. Passwater* (1895), 142 Ind. 375, 382; *Indiana, etc., R. Co. v. Quick* (1887), 109 Ind. 295.

The plat marked exhibit A is not included in the bill. If it were once properly made a part of the record, it might be made a part of the bill by reference. *Henry v.*

5. *Thomas* (1889), 118 Ind. 23, 26. When a paper has not been made a part of the record, it can not be thus incorporated. *Pittsburgh, etc., R. Co. v. Martin* (1901), 157 Ind. 216; *Gussman v. Gussman* (1895), 140 Ind. 433. The act of 1903 (Acts 1903, p. 338) has narrowed the scope of the cases last cited very greatly, but they are applicable to the plat named, which can not be held to be incorporated by reference, there being nothing whatever to authenticate it as the plat introduced.

The extent that questions presented can be considered, in the absence of any particular part of the evidence, is determinable from the facts of each case, and ques-

6. tions presented which can be so determined are considered. *Indiana Clay Co. v. Baltimore, etc., R. Co.* (1903), 31 Ind. App. 258; *Harrah v. State, ex rel.* (1906), 38 Ind. App. —. The plat introduced was designed to illustrate the testimony of the witness, descriptive of the place where the accident occurred. It was not essential to an understanding of the situation or surroundings, and its absence will not prevent the consideration of the questions presented in the connection named.

Certain instructions in writing were filed and requested by appellant, and the court of its motion gave thirty-seven written instructions, which were filed with the clerk.

7. Appellant, at the close of the instructions requested by it, entered a memorandum, dated and signed, showing that it excepted to the refusal to give certain of said instructions, designated by number. This brings the instructions refused and the instructions given by the court into the record. Acts 1903, p. 338, §1, §544a Burns 1905; *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541.

There was no error, for reasons heretofore indicated, in

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- admitting in evidence the ordinance which has been
8. considered in connection with the sufficiency of the complaint.

Three witnesses testified that immediately after the collision the motorman stated to the conductor that on account of the wet rail the brakes failed him and caused the

9. accident. The admissibility of the evidence depended upon whether the statement was a natural emanation from the occurrence, made spontaneously and so nearly contemporaneously as to be in the presence of the occurrence and under such circumstances as to exclude the idea of design or deliberation. *Louisville, etc., R. Co. v. Buck* (1889), 116 Ind. 566, 576, 2 L. R. A. 520, 9 Am. St. 883. If it was so made, it was a part of the occurrence and admissible; if it was only a narrative of a past transaction, it was hearsay and inadmissible. *Cleveland, etc., R. Co. v. Sloan* (1894), 11 Ind. App. 401, 405; *Citizens St. R. Co. v. Stoddard* (1894), 10 Ind. App. 278, 292. In the cases last cited, the statements sought to be shown were made after such an interval as clearly to disassociate them. The time occupied by the collision was very brief. The motorman was an actor in that occurrence. His expression was made in the presence of all concerned and under the immediate influence of the main event. It was interwoven with the surrounding circumstances so closely as that a presumption of spontaneity might reasonably arise. 24 Am. and Eng. Ency. Law (2d ed.), 665.

The court refused to submit certain interrogatories to the jury, requiring it to state in detail if the motorman operating the car failed to do anything which he

10. could have done under the circumstances to stop before the collision occurred. These interrogatories were not directed to any issue, there being no charge of negligence in the respect indicated. Interrogatories must be directed to the issues in the cause. Acts 1897, p. 128, §555 Burns 1901.

The sufficiency of the evidence to support the verdict and the correctness of the instructions given by the court, as well as its refusal to give those requested, depend

11. upon substantially the same propositions, *i. e.*, the duty of the court to declare contributory negligence as a matter of law. This question has been considered in a number of cases with some contrariety of result and expression, but it is now settled that each case must be determined upon its own facts, and that the question is primarily one for the jury. *Indianapolis St. R. Co. v. O'Donnell* (1905), 35 Ind. App. 312.

The disposition of the courts of this and of other states, in which the system of transportation by electric railroads is most advanced, in the infancy of such enterprises,

12. was to review verdicts involving the question of contributory negligence on the part of a traveler injured by collision with them, as though it were a matter of law, and to set up absolute standards by which the conduct of such persons should in all events be gauged. The effect of such course of decision was to create great uncertainty and to a large degree transferred the functions of the trial court to the appellate tribunal. No absolute standard can be declared which is not inaccurate, when considered in connection with the varying circumstances and facts of other cases, possessing in one or more respects a mere similarity. The result has been that arbitrary standards are no longer applied, but the question is submitted as a matter of fact, under the instructions of the court, to the trial jury, whose conclusion is given that weight and consideration to which it is entitled under our system of jurisprudence.

The verdict in the case at bar has received the approval of the learned judge who presided at the trial, and no good reason has been shown for setting it aside. The judgment is therefore affirmed.

ON PETITION FOR REHEARING.

ROBY, C. J.—Appellant, in support of its petition for rehearing, criticises the statement of fact made in the opinion as to the time when and the conditions under which the motorman made the statement received in evidence, over its objection.

If the testimony referred to in the brief was all the testimony in the case, this criticism might be well taken, but it is not, and the opinion of necessity is based upon

13. that portion of the evidence and those inferences deducible therefrom which are most favorable to appellee. If, however, it were conceded that the evidence objected to was incompetent, the error in its admission would not be available, for the reason that appellant had previously thereto, on cross-examination of the witness Justus, elicited the same facts. Upon the direct examination of this witness, appellee's counsel asked him what the motorman said. An objection being made the question was withdrawn. On cross-examination he was asked: "What did you hear Mr. Bobrink say?" This question being answered, the next one was: "What was it you say that the motorman said?" The next one: "What was it the motorman said about the rain?" Had the answers to the questions thus asked been favorable to appellant, it would have had the benefit of them; being unfavorable, it is not in position to complain of testimony upon the subject thus introduced by it. *Perkins v. Hayward* (1890), 124 Ind. 445; *Campbell v. Conner* (1896), 15 Ind. App. 23; *Blough v. Parry* (1896), 144 Ind. 463, 481.

This case was tried by a jury and at the same time by the learned judge of the Ohio Circuit Court. The verdict of the jury has received the approval of the judge, and it is not for this court to say that it ought not to have been so approved.

Petition for rehearing overruled.

WATSON v. WATSON.

[No. 5,588. Filed March 30, 1906.]

1. **DIVORCE.**—*Alimony.*—*Question for Court.*—The amount of alimony in a case of divorce is a question for the court, reviewable only in cases of abuse of discretion. p. 551.
2. **CONTRACTS.**—*Antenuptial.*—*Validity.*—Antenuptial contracts, free from fraud or imposition, and not against public policy, are enforceable. p. 551.
3. **HUSBAND AND WIFE.**—*Husband's Duty of Support.*—The husband is charged with the legal duty of supporting his wife to the extent of his ability. p. 551.
4. **CONTRACTS.**—*Antenuptial.*—*Fixing Amount of Alimony.*—*Public Policy.*—An antenuptial contract providing that upon separation for any cause the husband shall pay the wife \$200 in settlement of all liability for alimony is contrary to public policy and void. p. 552.
5. **DIVORCE.**—*Alimony.*—*Decree.*—*Effect.*—A decree of divorce necessarily settles both the marital and the property rights of the parties thereto. p. 553.

From Warren Circuit Court; *Joseph M. Rabb*, Judge.

Suit by John Watson against Rachel Watson. From a decree for defendant on her cross-complaint, plaintiff appeals. *Affirmed.*

James McCabe and *Edwin F. McCabe*, for appellant.

C. V. McAdams and *W. S. Potter*, for appellee.

MYERS, J.—This is a suit for a divorce instituted by appellant against appellee upon the ground of cruel and inhuman treatment. Appellee answered in general denial. She also filed a cross-complaint charging appellant with cruel and inhuman treatment, and averring that while appellant and appellee lived together as husband and wife she was compelled to clothe herself, furnish the house, and has paid to appellant \$700 in cash, of her own money, which he still holds, and demanding a divorce and alimony. Appellant answered the cross-complaint by denial. Trial by the court; finding and decree for appellee upon her

cross-complaint and against appellant upon his complaint. Appellee was granted a divorce, \$600 alimony and \$100 attorneys' fees. Appellant's motion to modify the decree and his motion for a new trial were each overruled and exceptions reserved.

The errors assigned question each of these rulings of the court, and, as presented by appellant, but one question is here for our decision, namely, the effect of an antenuptial contract on the question of alimony.

This contract is of considerable length, consequently we will only refer to so much thereof as will fairly present the question here to be decided. The contract was executed August 2, 1901. By this contract appellant agreed to marry appellee and support her and provide her with all the necessary home comforts reasonably due from a husband in his financial position, and in case of death, leaving appellee surviving him, to provide her with dower in real estate of the value of from \$1,500 to \$2,000 for her use and occupancy during her life, without the power of alienation. Appellee agreed to these stipulations and on her part to contribute annually during the life of the parties to this contract "the sum of \$150 to the use and support of the home and family of this marriage, out of and from the annual dower and heritage received by her from her mother's estate. The annual balance thereof, to wit, \$150, shall be retained by her to use and invest as she shall please." Then follows a provision with reference to children born of such marriage and children of said Watson by former marriages. Said contract further provides:

"That in case the parties hereto shall fail to agree, and shall, for any cause, separate and continue to live separate and apart, then and in that case each party hereto shall forfeit all claims and benefits of this contract, and shall not take any claim, interest nor right to and in the separate property of the other, either in the lifetime of the parties or at the death of either of said party hereto: Provided, that no such separation

shall exclude children born to this marriage from equal heirship in the estate of said Watson, and provided further that in case of separation of the parties hereto, for any cause whatsoever, said Watson shall, at the time of the separation, pay to said Downs the sum of \$200, and afterwards annually contribute a reasonable sum to the clothing of any children that shall be born to their marriage."

Appellant insists that \$200 is the limit of his liability to appellee in case of a separation for any cause, and that the decree should be modified so that the amount of appellee's recovery for alimony shall not exceed that sum. Also that a judgment for any greater sum is contrary to law and contrary to the evidence. We have carefully read all the evidence in the record, and in our opinion it is sufficient to support the action of the court in granting appellee a divorce.

A few features of this case which the evidence tends to establish we here exhibit: The parties were married August 2, 1901, and separated in August, 1904. At the time of the trial of this cause appellant was sixty-two and appellee forty-two years of age. Appellee was a cripple, and had been since she was eleven years of age, which appellant well knew at the time of their marriage. Appellee at the time of her marriage with appellant, under the will of her mother, had an annual income or annuity of \$300 secured by a lien upon certain real estate, which lien was junior to a mortgage of \$4,600. After her marriage with appellant she sold for \$1,250 her right to such annuity to the owners of the land and the parties charged with the payment of the same. She received on account of delinquent payments the sum of \$466.50. Of this total sum she had left, at the time of granting the divorce, \$550, evidenced by two notes, one for \$500 given by her father, with one of her brothers as surety, and the other given by one of her brothers, and this was all the property owned by her. The balance she had expended in the way of repayment to

appellant sums of money he had advanced to her and interest on such advancements, and for her support in the way of clothing, medicine and furniture for the dwelling in which they lived, and the annual payment of \$150 by her to be paid to him, as provided in said antenuptial contract. Appellant's financial worth is from \$6,000 to \$7,000 over and above his liabilities.

By eliminating the antenuptial contract, the circumstances of this case clearly authorized the allowance of alimony as fixed by the trial court. The amount of

1. such allowance is largely within the discretion of such court, and it is only in cases where it plainly appears that this discretion has been abused that an appellate tribunal will interfere. *Yost v. Yost* (1895), 141 Ind. 584; *Gussman v. Gussman* (1895), 140 Ind. 433; *Stutsman v. Stutsman* (1903), 30 Ind. App. 645; *Breedlove v. Breedlove* (1901), 27 Ind. App. 560.

If we should adopt appellant's construction of the antenuptial contract it would be in effect affirming a rule of law authorizing parties contemplating marriage to

2. fix in advance the husband's liability for alimony in case either shall obtain a divorce. This we can not do. While the law in this State is firmly fixed giving parties the right to adjust and settle property interests by antenuptial contract (*Leach v. Rains* [1897], 149 Ind. 152; *Kennedy v. Kennedy* [1898], 150 Ind. 636), and to have such settlement recognized and enforced by the courts, yet such settlement must be free from fraud or imposition (*Kennedy v. Kennedy, supra*), and not against public policy (*Neddo v. Neddo* [1896], 56 Kan. 507, 44 Pac. 1).

It is also equally well settled that the husband is bound to support his wife. *Rariden v. Mason* (1903), 30 Ind.

App. 425; *Scott v. Carothers* (1897), 17 Ind. App.

3. 673. This legal obligation is a part of every marriage contract. It is a duty imposed upon the husband by law, and from this obligation he can not shield

himself by contract. To hold otherwise would be to invite disagreement, encourage separation, incite divorce proceedings and commend a principle which would be a menace to the welfare of society, contrary to public policy, and tending to overthrow and destroy every principle of the law of marriage requiring that husband and wife shall live together during their natural lives, and that the husband, within his financial ability, shall furnish the wife with reasonable necessities for her support and home comforts in sickness and in health, as by law he is required to do. In *Neddo v. Neddo*, *supra*, the court well said: "No marriage settlement ought to be upheld which invites or encourages a violation of the marriage vows. * * * By the abandonment of the wife in violation of the law of marriage, it was in effect stipulated that the guilty party should be relieved from the duty of support which that law enjoins. A contract which incites, by the hope of financial profit, the separation of married people should not be enforced."

The case at bar furnishes a good illustration where a settlement under the contract would be an incentive to a separation strongly appealing to a mercenary person.

4. For, at no late day, under the facts here exhibited, the duty of supporting a crippled wife must fall entirely upon the husband. By the payment of the insignificant sum of \$200 he would be relieved from that duty and his estate additionally benefited by a cancellation of the dower stipulation in the agreement. Such a contract is contrary to public policy and can not be enforced. We must not be unmindful of the fact that the public have an interest in causes of this character aside from the parties, and for this reason the question of alimony is a matter for the court, and not a subject of agreement between the parties whereby the action of the court is to be controlled.

A decree of divorce not only terminates the marital obligation, but, from the nature of the litigation, property

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rights growing out of the marriage relation are
5. necessarily included in such proceedings and there settled. This rule applies to all cases alike, regardless of any contract the parties in contemplation of marriage may have made. *Behrley v. Behrley* (1884), 93 Ind. 255; *Rose v. Rose* (1884), 93 Ind. 179; *Hills v. Hills* (1884), 94 Ind. 436; *Nicholson v. Nicholson* (1888), 113 Ind. 131.

There is no error in the record. Judgment affirmed.

CITY OF HUNTINGTON v. STEMEN.

[No. 5,561. Filed April 3, 1906.]

1. **PLEADING.**—*Cross-Complaint.*—*When Treated as Original.*—*Appeal and Error.*—Where the parties at the trial treat a cross-complaint as the original complaint, it will be so considered on appeal. p. 554.
2. **ACTION.**—*Misjoinder.*—*Quieting Title.*—*Nuisance.*—A demurrer for misjoinder of causes should be sustained where one paragraph of a complaint is for quieting title and another is for damages caused by a nuisance, but error in overruling same is by statute not reversible (§344 Burns 1901, §341 R. S. 1881). p. 554.
3. **EVIDENCE.**—*Nuisance.*—*Sewers.*—*Damages for Construction of.*—In an action for damages on account of the maintenance of a nuisance by a city, it is not competent to admit evidence of damages caused by the construction of a sewer across plaintiff's lot, such damages being recoverable only in the proceeding for the construction of such sewer. p. 555.
4. **NUISANCE.**—*Damages.*—*How Proved.*—A complaint for damages for the destruction of property by a nuisance is proved by evidence showing the depreciation in value of such property because of such nuisance. p. 556.
5. **EVIDENCE.**—*Nuisance.*—*Damages.*—*Opinions.*—In an action for damages for the maintenance of a nuisance by a city, the question "What was the damage sustained by reason of that sewer?" was incompetent because of including damages not properly included in the action and also because of eliciting a mere opinion and not a fact. p. 556.

6. **NEW TRIAL.**—*Nuisance.*—*Damages.*—*Evidence.*—In an action for damages for the maintenance of a nuisance, where there is no legal evidence upon which to base a verdict for plaintiff, a new trial should be granted. p. 556.

From Huntington Circuit Court; *James C. Branyan*, Judge.

Suit by Samuel A. Stemen against the City of Huntington. From a decree for plaintiff, defendant appeals. *Reversed.*

W. A. Branyan, for appellant.

T. G. Smith and *A. G. Johnson*, for appellee.

ROBINSON, J.—The transcript in this appeal begins with the filing by appellee of what is called a cross-complaint.

It seems that this cross-complaint was treated by

1. the court and by the parties, in forming the issues and upon the trial, as an original complaint, and it will be so considered on this appeal.

The pleading is in two paragraphs. One is to quiet title, and the other seeks damages for maintaining a nuisance.

The demurrer for misjoinder of causes of action

2. should have been sustained, and the causes docketed as two separate actions, as provided by §343 Burns 1901, §340 R. S. 1881. Overruling the demurrer was error, but it is provided by §344 Burns 1901, §341 R. S. 1881, that "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." *Armstrong v. Dunn* (1896), 143 Ind. 433; *File v. Springel* (1892), 132 Ind. 312; *Crum v. Yundt* (1895), 12 Ind. App. 308; *Fitzmaurice v. Puterbaugh* (1897), 17 Ind. App. 318.

The court instructed the jury that no question was presented for their determination under the first paragraph of complaint, and the jury returned a verdict in appellant's favor on that paragraph.

The second paragraph avers in substance that in 1901 appellant unlawfully and without leave entered upon a

certain lot of which appellee was and is the owner and in possession, and by excavations and fills constructed thereon a deep ditch or basin, and so constructed the same as to destroy and undermine the part upon which foundation walls could or should be erected and thereby made it impossible properly to erect such walls, and left it in such condition as to create a reservoir or pool into which the city causes to be emptied large quantities of foul, putrid and offensive matter, which remains in such reservoir or pool on or about the premises, and from which arises loud, noisome and noxious odors in, upon and about the property, rendering the same unhealthful and undesirable "for the purposes for which appellant [plaintiff] desires to use the same, or for any purpose, to the injury of said premises in the sum of \$500, whereby plaintiff is injured in the sum of \$500, for which he demands judgment, and for all other proper relief."

It appears from the evidence that, beginning in 1899, appellant constructed a sewer and assessed benefits and damages to certain property, among which was the

3. property of appellee. All of the proceedings of the council leading up to and including the assessments were introduced in evidence. It also appears that a precept was issued, as provided in §3628 Burns 1901, §3165 R. S. 1881, and an appeal taken by appellee, which was afterwards dismissed. Evidence was introduced, over objection, to show that appellee's property was damaged by reason of the construction of the sewer across the property, that the sewer would interfere with building foundations, the effect on walls built over the sewer, the manner in which an adjacent building must be built because of the sewer, and other like matters. These matters were not competent evidence in this action, and in an instruction the court took them from the consideration of the jury and gave an instruction to the effect that in determining appellee's

damage, if any, they could give such damages only as the evidence showed resulted from the manner in which appellant was maintaining the sewer with the pool or reservoir gathering the sewage from which arose the offensive odors.

But there is no evidence in the record from which the jury could legally determine these damages. If the appellee is entitled to any damages under the second

4. paragraph of the complaint, it is because of the depreciation in value of the property, which it is averred has been rendered unfit for any purpose. One witness, after testifying that the buildings were damaged in the construction of the sewer, the manner in

5. which additional buildings on the lot must be constructed on account of the location of the sewer across the lot, and the offensive odors arising from the pool or reservoir in the sewer, was asked, over objection, the following question: "What was the damage sustained by reason of that sewer?" and answered: "I would put the damage at \$1,000." This was clearly incompetent, not only as to the manner of proving the damages, but also as taking into consideration certain matters not relevant to any issue in the case.

If appellee was aggrieved in the assessment of benefits and damages growing out of the original construction of the sewer, the statute provides a remedy. He can not

6. litigate those matters in this action. So far as the introduction of the evidence was concerned the case seems to have been tried upon the theory that all injuries resulting to appellee's property, not only from the construction of the sewer but also from the manner in which it was subsequently maintained, might be taken into consideration in determining the damages. It is true an instruction to the jury limited the injuries to the property for which damages could be had, but there is no legal evidence in the record from which these damages may be determined.

Judgment reversed, with instructions to grant a new trial, and leave to amend the complaint if requested.

TYLER ET AL. v. DAVIS.

[No. 5,092. Filed June 30, 1905. Rehearing denied October 10, 1905. Appeal to Supreme Court dismissed April 6, 1906.]

1. **PROCESS.**—*Service by Leaving Copy.*—*Special Appearance.*—*Motion to Quash.*—A sheriff's return showing that summons was served upon defendant by leaving a certified copy thereof at defendant's last and legal place of residence, in the absence of fraud, is conclusive against a collateral attack. p. 566.
2. **APPEAL AND ERROR.**—*Summons.*—*Return.*—*Motion to Quash.*—*Who Can Take Advantage of.*—The overruling of a motion to quash the return of the sheriff to the summons, by a party upon special appearance, can not be questioned on appeal by other parties who failed to question the service upon them. p. 566.
3. **GAMING.**—*Action to Recover Money Lost.*—*Parties.*—The wife of the person losing money at gambling is not a necessary nor proper relatrix in an action by the State to recover such money. p. 566.
4. **SAME.**—*Money Lost.*—*Beneficiary.*—*Husband and Wife.*—*Judgment.*—The wife is the exclusive beneficiary of a judgment recovered by the State for money lost by her husband at gambling. p. 566.
5. **SAME.**—*Enforcement of Judgment for Money Lost.*—*Parties.*—*Husband and Wife.*—The wife is the proper plaintiff to sue for the enforcement of a judgment recovered by the State for money lost by her husband at gambling. p. 567.
6. **PLEADING.**—*Making New Parties.*—*Amendments.*—Under §273 Burns 1901, §272 R. S. 1881, the court has power to permit others, who may be interested, to be made parties to an action by proper amendment. p. 567.
7. **SAME.**—*Substitution of Plaintiffs.*—*Amendments.*—*Gaming.*—It is proper for the trial court to permit the wife, who is the beneficiary of a judgment recovered by the State in an action to recover her husband's money lost at gambling, to be substituted as plaintiff instead of the State in a suit for the enforcement of such judgment, such amendment making no change in the issues. p. 568.
8. **EVIDENCE.**—*Judgment for State.*—*Gaming.*—*Action by Wife.*—*Variance.*—A judgment in favor of the State in an action to recover money lost by a husband at gambling is competent evidence to sustain a suit by the wife for the enforcement, in her behalf, of such judgment. p. 569.

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9. TRIAL.—*Special Findings.—Evidentiary Facts.—Appeal and Error.*—Where the special finding of facts contains the facts material to the issue mingled with others immaterial or evidentiary, the judgment will not be disturbed on appeal where the material facts found support such judgment. p. 569.
10. SAME.—*Special Findings.—Inferences.*—Trial courts are permitted to draw reasonable inferences from facts proved, and special findings embodying facts so inferred are legally sustained by the evidence. p. 569.
11. SAME.—*Special Findings.—Motions to Make Additional.—New Trial.*—Motions that the trial court make additional special findings are not recognized by the Indiana procedure, the remedy being a motion for a new trial. p. 570.
12. SAME.—*Conclusions of Law.—Gaming.—Judgment for State.—Collection by Wife.*—Conclusions of law, in a suit by the wife for the enforcement in her favor of a judgment in favor of the State in an action by the State to recover her husband's money lost at gambling, that there is due the wife the amount evidenced by such judgment, is correct. p. 570.
13. APPEAL AND ERROR.—*Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence. p. 571.
14. SAME.—*Briefs.—Failure to Cite Pages of Transcript.*—The failure of appellants in their brief to cite the pages of the transcript where the objectionable evidence may be found is a waiver of any questions thereon. p. 571.
15. NEW TRIAL.—*Evidence.—Disclaimer.*—A defendant refusing to file a disclaimer and filing an affirmative answer can not complain on appeal that the evidence was insufficient to sustain a judgment against him when there was some evidence to support such judgment. p. 572.
16. FRAUDULENT CONVEYANCES.—*Consideration.—Gaming.—Evidence.*—A conveyance, without consideration, made to the grantor's sister for the purpose of preventing a husband who had lost his money to such grantor at gambling from recovering same, is fraudulent as to the wife who is the beneficiary of a judgment in an action by the State for the recovery thereof. p. 572.

From Greene Circuit Court; *Orion B. Harris*, Judge.

Suit by Annie V. Davis against Dallas Tyler and others. From a decree for plaintiff, defendants appeal. (On appeal to Supreme Court, see 166 Ind. 366.) *Affirmed.*

W. R. Gardiner, C. S. Gardiner and T. D. Slimp, for appellants.

C. K. Tharp and Ogden & Inman, for appellee.

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COMSTOCK, J.—October 4, 1901, a suit was instituted in the name of the State of Indiana by the prosecuting attorney at the instance of Annie V. Davis, as the wife of Richard C. Davis, in the Daviess Circuit Court, against Matthew Kelly and Dallas Tyler, to recover from the defendants the sum of \$10,000, alleged to have been lost by said Richard C. Davis to the defendants in gambling, and for which said Davis had failed for six months to sue. The venue of the cause was changed to the Knox Circuit Court, where it was tried February 27, 1902, and a judgment rendered against Kelly and Tyler for \$9,000 in favor of the State of Indiana.

Afterwards an action was commenced in the Daviess Circuit Court, in the name of the State of Indiana, against appellants and Philip Meeh, to set aside a certain deed made by Tyler to his sister, and subject the property conveyed thereby to the payment of the \$9,000 judgment. Meeh filed a disclaimer, and on the application of the appellant Alwilda Tyler Graves the venue of the cause was changed to the Greene Circuit Court. The Greene Circuit Court sustained the demurrers to the complaint, whereupon on her petition the appellee was substituted as plaintiff instead of the State of Indiana, and she filed her complaint in this action, from which Philip Meeh was dropped as defendant.

The complaint was in one paragraph. After reciting the substitution of the plaintiff instead of the State of Indiana it shows that during the months of June and July, 1900, but prior to July 21, Richard C. Davis lost to the defendants Dallas Tyler and Matthew Kelly, at gambling by betting and wagering money on games of dice known as "craps," the sum of \$9,000, all of which said Tyler took and received from said Davis, and has ever since kept, appropriated and converted to his own use, and refused and failed to refund, repay or return any part thereof to said Davis or any other person whatsoever; that

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at the time said Davis so lost said money he was, and ever since has been, a married man, with a wife and three children, all of whom live with and constitute the family of said Davis, at the city of Washington, Daviess county, Indiana; that the wife of said Davis was and is this plaintiff, Annie V. Davis; that after said Davis so lost said money to said Tyler he did not within six months thereafter, or at any other time, sue for the recovery of said money, or any part thereof, but failed to bring or prosecute any suit for the recovery of said money, and no part of the same was recovered by said Richard C. Davis; that after the expiration of six months from the time of losing said money this plaintiff, as wife of said Richard C. Davis, duly filed with J. Alvin Padgett, prosecuting attorney within and for Daviess county, Indiana, an information setting forth all the facts touching said games and the loss of said money by said Richard C. Davis; that said prosecuting attorney and counsel employed by this plaintiff caused a suit to be brought and filed in the Daviess Circuit Court against said Tyler and Kelly in the name of the State of Indiana, to recover said money for the use and benefit of this plaintiff, Annie V. Davis; that thereafter, to wit, on the — day of January, 1902, on the application of said Tyler and Kelly, the venue of said cause was changed to Knox county, Indiana; that during the January term, 1902, of said Knox Circuit Court, said cause was put at issue and duly tried, and on February 27, 1902, a judgment of said Knox Circuit Court was rendered on the verdict of the jury in said cause for \$9,000 jointly against Dallas Tyler and Matthew Kelly and in favor of the plaintiff in said cause, the State of Indiana; that said judgment still remains in full force and effect and unappealed from and unpaid; that there was also judgment rendered against said defendants for \$100.95 cost in said cause. And said plaintiff further says that at the time said Tyler so won said money as aforesaid and long prior thereto he was the

owner in fee simple of the following real estate in the city of Washington, Daviess county, Indiana: [Describing it]. That by a certain instrument, purporting to be a deed of conveyance dated June 4, 1900, but not admitted to record in the deed records of said Daviess county until July 23, 1900, said Dallas Tyler pretended to convey to the defendant Alwilda Tyler Graves, who was a sister of said Dallas, all of said real estate for the stated consideration of \$1 and love and affection. Plaintiff says that said pretended deed is fraudulent and void as to this plaintiff and as to said judgment so rendered against said Dallas Tyler and Matthew Kelly in favor of the State of Indiana for her benefit for the following reasons, to wit:

(1) There was no consideration whatever for the conveyance of said real estate to said Alwilda.

(2) Said deed was pretended to be made on June 4, 1900, just prior to the time said Tyler won as aforesaid said money from said Richard C. Davis for which said judgment was rendered, but was not delivered to said Alwilda and placed on record in said county until after said Tyler had won said money as aforesaid, and was prepared and signed by said Tyler solely in anticipation of winning said money from said Davis, and to prevent said real estate from being subjected to the payment of any judgment which might thereafter be rendered against him for the recovery of said money or any part thereof.

(3) Said pretended deed and conveyance by said Dallas to Alwilda was meant and intended by them to be and constitute a charge, trust and limitation of the use in and to said real estate in favor of said Dallas Tyler made and created with intent to cheat and defraud the plaintiff Annie V. Davis, who is beneficiary of said judgment as rendered in the name of the State of Indiana against said Tyler and Kelly, and for whose use and benefit said suit was prosecuted and said judgment was rendered.

(4) Said pretended deed was a deed of gift and conveyance from said Dallas Tyler to said Alwilda Tyler Graves made by said Dallas to said Alwilda to be held in trust by her for the use and benefit of said Dallas and received by her to be held in trust for said Dallas Tyler.

(5) Said pretended deed of conveyance from said Dallas Tyler to said Alwilda Tyler Graves was made by him and received and suffered to be received by her with intent to hinder, defraud and delay the plaintiff in the collection of said judgment so rendered against said Tyler as aforesaid. Plaintiff further avers that at the time and subsequent to the time said Tyler so incurred said liabilities for which said judgment was rendered as aforesaid against him and said Kelly, he, said Tyler, was the owner of a large amount of personal property, to wit: \$12,000 in cash of the lawful money of the United States; that in order further to carry out, consummate and complete his fraudulent purpose, scheme and intention to shield, secrete and protect said cash and his property from being subjected to the liabilities which he had incurred by reason of his illegal and unlawful acts as aforesaid, and further to cheat, hinder, delay and defraud the plaintiff out of her just and lawful claims and demands against him on account of his illegal and unlawful acts as aforesaid, said Tyler placed and secreted \$9,000 of said cash in a safety vault of a banking house at Seymour, Indiana, and other places, all unknown to plaintiff, and loaned \$3,000 of said \$12,000 to good and solvent residents of Jackson county, Indiana, and took notes as evidence of said loans in three promissory notes, and, for the fraudulent purpose of concealing same and further to cheat, hinder and defraud the plaintiff, made said promissory notes payable to said Alwilda Tyler Graves; that no part of said sums so loaned in the name of said Alwilda belonged to her, but said Dallas made said loans in her name, and she suffered and permitted him to use her name

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as payee in said notes and to receive and hold same all in order to aid and assist said Dallas to cover up and conceal said money, and to cheat, hinder and defraud the plaintiff out of her just and lawful claims and demands, and said judgment so rendered as aforesaid, and with the secret purpose and intent to secrete and hold same in trust for said Dallas Tyler; that on the day of the rendition of said judgment against said Tyler and Kelly, to wit, February 27, 1902, but before the jury returned the verdict in said cause, and before the court rendered its judgment in said cause against said Tyler and Kelly for said \$9,000, said Tyler secretly, clandestinely and without the knowledge of plaintiff took all the cash he then had, to wit, said \$9,000, and fled from the State of Indiana with same, and has ever after kept the same beyond the jurisdiction of the courts of Indiana; that immediately after the rendition of said judgment, in order to keep plaintiff from seizing and subjecting said \$3,000 which he had loaned in the name of Alwilda Tyler Graves to the partial satisfaction of said judgment, and further to cheat, hinder and defraud the plaintiff, said Dallas Tyler procured the parties to whom he had loaned the same, by a liberal discount, to repay the same to said Alwilda long before said notes were due, and said Alwilda, for the purpose of aiding and assisting said Dallas to hinder, delay and defraud the plaintiff, received for said Dallas said \$3,000, and as plaintiff is now advised, and so avers, said Alwilda and her husband, the defendant George Graves, are now holding in secret, and in trust for said Dallas, said \$3,000 so paid on said notes, in order to keep plaintiff from discovering the same and subjecting it to the satisfaction of said judgment; that they aided said Dallas in collecting said \$3,000, and are aiding him to transfer same beyond the jurisdiction of the State of Indiana—all for the purpose of cheating, hindering and delaying this plaintiff from collecting her just and lawful demands, and said judgment from said Dallas Tyler.

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Plaintiff further says she is the sole and only beneficiary of said judgment, and sole and exclusive owner of same; that the action in which said judgment was rendered was brought and filed in the name of the State of Indiana for her sole and only benefit, and she is prosecuting this action in her name in lieu and instead of the State of Indiana for the enforcement of said judgment so rendered in the name of the State of Indiana for her use and benefit; that beside said real estate and said cash and the cash derived from the collection of said \$3,000 notes said Tyler is the owner of no other property subject to execution in the State of Indiana, and was not and never has been the owner of any other property subject to execution in the State of Indiana since the day of the rendition of said judgment, and has not been the owner of any property since the delivery and recording of said deed to said Alwilda Tyler Graves subject to execution within the State of Indiana except said real estate and said cash and notes, all of which, before the rendition of said judgment, he disposed of as aforesaid, leaving nothing whatever subject to execution within the State of Indiana, out of which said judgment or any part of it can be made; that said Matthew Kelly is hopelessly and notoriously insolvent.

And plaintiff further says that immediately after the rendition of said judgment, to wit, on March 1, 1902, she caused execution to be issued by the clerk of the Knox Circuit Court on said judgment directed to the sheriff of Knox county, said county being the county where said judgment was rendered, and at the same time an execution to be issued by said clerk on said judgment directed to the sheriff of Jackson county, in the State of Indiana, said county being the county where said Tyler at that time, and ever since has resided, and likewise an execution to be issued by said clerk on said judgment directed to the sheriff of Daviess county, where said Matthew Kelly then, and ever since has resided; that all of said executions as to said

Tyler have been returned by said sheriffs indorsed wholly unsatisfied, and said Tyler not found, and as to him no property found on which to levy same; that the execution directed to the sheriff of Daviess county was by him levied upon certain personal property belonging to said Kelly, and after due notice the same was by said sheriff sold, out of which there was realized the sum of \$——, leaving a balance of \$9,000 wholly due and unsatisfied on said judgment and execution; that on March 1, 1902, she caused a duly certified copy and transcript of said judgment rendered in the Knox Circuit Court to be duly filed in the office of the clerk of the Daviess Circuit Court, and to be duly recorded in the order-books of said court, and said judgment then and now still remains a valid and subsisting lien on and against all of said real estate; that said instrument purporting to be a deed from said Dallas Tyler to said Alwilda Tyler Graves is fraudulent and void as against the plaintiff and said judgment, and prevents the plaintiff from enforcing the payment of said judgment or any part thereof; that said real estate, hereinbefore described, is of the full value of \$7,000; that it will require all of same and said \$3,000 so paid to and held by said Alwilda fully to pay and satisfy said judgment, interest and cost; that said George Graves is husband of said Alwilda.

Wherefore plaintiff prays judgment and decree against said Dallas Tyler, Alwilda Tyler Graves and George Graves, declaring said deed from Dallas Tyler to Alwilda Tyler Graves fraudulent and void as to the plaintiff and said judgment, and that the same be set aside and held for naught; that said judgment be declared a valid and subsisting lien on and against all of said real estate superior and paramount to the interest and title of said Alwilda Tyler Graves and George Graves and said Dallas Tyler; that said Alwilda and George Graves, and each of them, be required to answer under oath as to said \$3,000, and required to discover same and pay same over to the clerk

of this court for the use and benefit of this plaintiff, and finally for all just and proper relief in the premises.

Appellant's first proposition is that the court erred in overruling the motion of Dallas Tyler made on his special appearance to quash the summons and the return

1. issued against him. The evidence shows that when the summons was served Tyler was, and had been for seventeen years, a resident of Seymour. The return of the sheriff of Jackson county shows service by leaving a true and certified copy at his last and legal place of residence. It is regular on its face, and in the absence of a charge of fraud is conclusive as against a collateral attack. *Cully v. Shirk* (1892), 131 Ind. 76, 31 Am. St. 414.

If there was error in failing to quash said summons it was harmless, so far as appellants are concerned. Alwilda

Tyler Graves and her husband were duly served,

2. and they claimed that Alwilda Tyler Graves is the exclusive owner of the real estate in controversy; that Dallas Tyler is not interested in such estate. She has had her day in court.

It is claimed that the action having been instituted in the Daviess Circuit Court by the State of Indiana as sole plaintiff against the appellants and Philip

3. Meeh, and the venue having been changed to the Greene Circuit Court, it was error to substitute the appellee for the original plaintiff over the objection of the appellants and without the consent of the official representatives of the State. Annie V. Davis was not a proper or necessary party relatrix in the action by the State of Indiana to recover the money lost at gambling. *Ervin v. State, ex rel.* (1893), 150 Ind. 332.

While she was not a necessary party in the action to recover the money lost at gambling, yet when the State recovered such judgment, she, as the wife of the

4. loser of such money, became the exclusive beneficiary and owner of the judgment, and entitled

to all equitable and legal remedies to protect and enforce such judgment.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." §251 Burns 1901, §251 R. S. 1881.

5. The next section is as follows: "An executor, administrator, a trustee of an express trust, or a party expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." §252 Burns 1901, §252 R. S. 1881. Whoever is entitled to the benefits of a suit is the real party in interest, and should institute the suit. *Rawlings v. Fuller* (1869), 31 Ind. 255; *Smock v. Brush* (1878), 62 Ind. 156; *Board, etc., v. Jameson* (1882), 86 Ind. 154; *Pirley v. Van Nostern* (1885), 100 Ind. 34.

Section 6678 Burns 1901, §4953 R. S. 1881, provides that the State of Indiana is the proper party to bring suit for money lost at gambling after the loser thereof fails for six months to sue for and recover such money. By the express provision of the statute if the loser of the money which the State sues for and recovers have a wife then she is made the sole beneficiary of such judgment; if such loser have no wife but have children then such children are made the beneficiaries; but if such loser have neither wife nor children then the common schools become the beneficiary. Under the statute, then, Annie V. Davis is the party designated as the sole beneficiary of such judgment, and the proper party to prosecute any proceedings.

Section 273 Burns 1901, §272 R. S. 1881, gives the court the right to determine any controversy between the parties before it when it can be done without preju-

6. dice to the rights of the others, or by saving their rights; but when a complete determination of the

controversy can not be had without the presence of other parties the court must cause them to be joined as proper parties. And when in an action for the recovery of real or personal property a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be made a party by proper amendment. The right is recognized in the following decisions: *McCall v. Lee* (1887), 120 Ill. 261, 11 N. E. 522; *Brown v. Cody* (1888), 115 Ind. 484; *Pound v. Irwin* (1888), 113 Ind. 243; *Homer v. Barr Pumping Engine Co.* (1901), 180 Mass. 163, 61 N. E. 883; *Congress Construction Co. v. Farson & Libbey Co.* (1902), 199 Ill. 398, 65 N. E. 357; *State, ex rel., v. Ludwig* (1900), 106 Wis. 226, 82 N. W. 158; *Hook v. Garfield Coal Co.* (1900), 112 Iowa 210, 83 N. W. 963; *Garcia v. United States* (1902), 37 Ct. Cl. 243; *Clough v. Thomas* (1876), 53 Ind. 24.

We think it may be held, upon the weight of the authorities that have been and the many others that might be cited, that upon the trial of a cause, when there is

7. no change in the issues, nor in the relief demanded, and there can be no change in the results reached, and when the court has acquired jurisdiction of the parties and of the subject-matter, there is then a discretion vested in the court on the subject of amendments and the substitution of parties so as fully to settle the question of proper parties and the rights of the parties before them. The original complaint which was filed in the name of the State of Indiana to set aside the Tyler deed, and the substituted complaint which was afterwards filed in the name of appellee, Annie V. Davis, are in substance the same. The same defense and the same evidence would have been available to appellants whether the suit was in the name of the State or in the name of Annie V. Davis. The conclusion would have been the same with either as plaintiff, and such

conclusion would be a bar to another action for the same cause. There was therefore no available error in the substitution.

Appellants contend that there was a fatal variance between the certified copy of the proceedings in the Daviess and Knox circuit courts in the case of the State of

8. Indiana v. Tyler and Kelly and the complaint in the case at bar, in that the judgment in that case did not sustain the allegation that it was for the use and benefit of the appellee. It would have been improper for the judgment to have so stated. She was not a proper party in the suit to recover the money lost in gambling. *Ervin v. State, ex rel., supra*. We have considered this question in discussing the substitution of appellee for the State in said cause.

In their seventh point appellants insist that the special findings from one to thirty-seven, inclusive, are of immaterial, evidentiary facts, and not of ultimate facts;

9. that the consideration of said facts and those in each of said findings confused the judgment of the court and prevented an impartial consideration of the facts material to the issues. The proposition is true as to some of the special findings, but we can not concede that they confused the court and prevented an impartial consideration of the facts material to the issue.

It is contended that special finding number thirty-five is not sustained by evidence, and is contrary to law, and that the ultimate facts stated therein are in irrecon-

10. cilable conflict with the evidentiary facts material to the issue stated in the other findings. That finding is as follows: That said deed, dated June 4, 1900, by said Dallas Tyler to said Alwilda Tyler Graves, was and is a voluntary conveyance made by said Tyler to said Alwilda, and was made by him and received by her with the secret purpose and intent on the part of both that said Alwilda Tyler Graves should and would hold said real

estate therein described in trust for the use and benefit of Dallas Tyler. Courts may draw reasonable inferences from facts proved. We can not say that such facts are wholly unsupported by evidence, or are contrary to law, or are in irreconcilable conflict with evidentiary facts material to the issues stated in the other findings.

The appellants moved that the court add to and include in its special finding of facts special findings from one to nine, inclusive, and each of them, which appear in

11. the record as numbered. The court refused. Appellants duly excepted. "It has been uniformly held by this court that motions to modify, strike out, or add to the special findings are not recognized by our code of procedure. Where any or all of the facts found are not sustained by the evidence, or are contrary to law, or where facts should have been found but were not, the proper remedy is a motion for a new trial." *Chicago, etc., R. Co. v. State, ex rel.* (1902), 159 Ind. 237.

Appellants excepted to conclusions of law from one to five, inclusive, and in rendering judgment thereon in favor of appellee. The conclusions stated: (1)

12. That there was due from the defendant Dallas Tyler to the plaintiff, Annie V. Davis, on the judgment set forth in the plaintiff's complaint the sum of \$8,716.84; (2) that said judgment was rendered for the use and benefit of the plaintiff, Annie V. Davis, and that she is the sole and only owner of that judgment; (3) that the deed of conveyance dated June 4, 1900, from Dallas Tyler to Alwilda Tyler Graves, mentioned and set forth in the complaint, was and is a voluntary conveyance, without consideration, made by him and received by her in trust for Dallas Tyler; that under said conveyance said Alwilda took and now holds the real estate described in said deed in trust for said Dallas Tyler, and said deed is void as against the judgment set out in the complaint, and

as to the plaintiff's claim thereunder; (4) that the judgment set forth in the plaintiff's complaint, and plaintiff's claim thereunder, is a lien on the real estate mentioned in the complaint, except that part of said real estate described as being a part of lot one in Kinney's addition, superior and paramount to the title, claim and interest of the defendants, and either of the defendants, in and to said real estate; (5) that said deed prevents plaintiff from collecting the judgment set forth in her complaint and ought to be set aside, canceled and held for naught as against the judgment and the plaintiff's claim thereunder set out in the plaintiff's complaint, and said real estate, or so much thereof as may be necessary, subjected to sale for the satisfaction of said judgment and plaintiff's claim thereunder; that said real estate herein set out is the only property subject to execution owned by said Dallas Tyler in the State of Indiana. We find no error in these conclusions of law.

It is next contended that the judgment is not fairly supported by, and that the same is clearly against, the weight of the evidence. Appellants therefore ask

13. this court to weigh the same under section eight of the act of 1903 (Acts 1903, p. 338, §641h Burns 1905). The Supreme Court and this Court have recently held that appellate courts will not weigh the evidence under said act. *Hudelson v. Hudelson* (1905), 164 Ind. 694; *United States, etc., Paper Co. v. Moore* (1905), 35 Ind. App. 684.

In point fourteen it is claimed that none of the items of evidence and testimony referred to in the fifth reason for a new trial and numbered from one to twenty, inclu-

14. sive, and those numbered twenty-five, thirty-six, thirty-seven, thirty-eight and thirty-nine tended to sustain any material issue in the case, and that the court erred in admitting them and each of them. Appellant's brief does not give the page of the record showing these

alleged errors. The record is voluminous, containing over seven hundred pages. The same is true of point fifteen, which is to the effect that the items of evidence and testimony referred to in the fifth reason for a new trial and numbered twenty-one to thirty-five, inclusive, except twenty-five, that were offered in evidence by the appellants, were competent and material on their behalf, and on behalf of each of them, in their defenses and tended to rebut the evidence presented by appellee and sustain the issues on their behalf. As to both of these points rule twenty-two of the Supreme Court is disregarded, and it will be presumed that appellants did not expect them to be considered.

The sufficiency of the evidence to sustain the findings and judgment of the court is questioned. It is claimed that the special finding of facts does not justify a judgment against George Graves. He appeared to the complaint and answered by general denial and by affirmative answer. If he were without interest in the proceeding he should have filed a disclaimer, but the evidence discloses that he was not wholly without pecuniary interest.

In the rulings on the pleadings we find no reversible error. Upon the merits of the case it can be fairly said appellant Tyler, in a manner contrary to law, obtained from the husband of appellee a large sum of money, and converted it to his own use. By the folly of Davis his wife is made to suffer in mind and in bodily comfort. The sister of Tyler, in being made the grantee of her brother, is the beneficiary of her brother's wrongful acts. That both of these women interested in this case are innocent of wrongdoing we may well believe. Fraud is a question of fact. The number of its badges is almost without limit. It may be proved by circumstantial or direct evidence. Circumstances, apparently trivial in themselves when considered singly, may, when taken in

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connection with others, fix the fraudulent character of a transaction. The parties between whom a transaction takes place often give point to conduct which otherwise would be free from suspicion. And so where fraud is charged it is a question peculiarly within the province of the trial court or jury. The trial court has specially found that no consideration passed to said Dallas Tyler for the conveyance of the property in question; that said conveyance was made by him and received by his sister with the purpose and intent on the part of both of them that said Alwilda should and would take and hold said real estate therein described in trust for the use and benefit of said Dallas; and that the deed to his sister was wholly voluntary. To indicate the various facts and circumstances set out in the evidence from which a fraudulent purpose might be inferred, or that the conveyance of the real estate was without consideration, and was to be held in trust for the use and benefit of Tyler by his sister, would be to extend the length of this opinion without a corresponding advantage.

We find no error for which the judgment should be reversed. Judgment affirmed.

POSEY COUNTY FIRE ASSOCIATION v. HOGAN.

[No. 5,631. Filed April 17, 1906.]

1. **INSURANCE.—Contracts.—Oral.—Validity.**—Oral contracts for insurance are valid. p. 576.
2. **SAME.—Contracts.—Oral.—Essentials.**—Oral contracts of insurance must contain the essentials of a written contract therefor and must be enforceable by both parties. p. 576.
3. **PLEADING.—Complaint.—Insurance.—Oral Contracts.**—A complaint upon an oral contract of insurance, showing the plaintiff's application, description of property, title, amount, period, agreement for policy in usual form, loss, demand for policy and performance of conditions by plaintiff, is sufficient. p. 577.

4. **PLEADING.**—*Complaint.*—*Insurance.*—*Oral Contracts.*—*Exhibits.*—In a complaint upon an oral contract of insurance an exhibit of the usual form of policy, alleged to have been contracted for, is unnecessary and adds nothing to the complaint. p. 578.
5. **INSURANCE.**—*Contracts.*—*Oral.*—*Consideration.*—A promise by assured to pay his proportion of the losses of a mutual fire company is a valid consideration for a parol contract of insurance. p. 578.
6. **SAME.**—*Contracts.*—*Oral.*—Where the evidence shows that the husband's guardian had such husband's property insured in defendant mutual fire company; that upon such husband's arrival at majority he conveyed said property to his wife; that his policy was delivered to the secretary of such company, who had power to issue policies, and a notice of such conveyance was given and a request made for a new policy to be issued to the wife, which request was granted, but such new policy was not issued before the loss complained of, such wife can recover for such loss. p. 578.
7. **SAME.**—*Mutual Fire.*—*Appraisement.*—*By-Laws.*—Where the guardian of a husband has such husband's property insured, and during the life of such policy the husband conveys same to his wife and requests such company to issue a new policy to her, in lieu of the old policy, which the secretary, with power to issue policies, agrees to do, a new appraisement is not necessary, though the by-laws of such company require an appraisement with each policy, no deterioration being shown. p. 581.
8. **SAME.**—*Mutual Fire.*—*Payments of Premiums.*—*Conditions Precedent.*—Assured in a mutual fire company is not required as a condition precedent to pay his premium until a delivery of the policy. p. 581.
9. **TRIAL.**—*Instructions.*—*How Considered.*—Instructions should be considered as an entirety and if they fairly present the case to the jury, no reversible error is committed. p. 582.
10. **APPEAL AND ERROR.**—*Right Result.*—Where the trial court reached a right result, its judgment will not be disturbed on appeal. p. 582.

From Posey Circuit Court; *Alexander Gilchrist*, Special Judge.

Action by Zillah Hogan against the Posey County Fire Association. From a judgment for plaintiff, defendant appeals. *Affirmed.*

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Daniel O. Barker, Frederick P. Leonard and George F. Zimmerman, for appellant.

G. V. Menzies and Herdis F. Clements, for appellee.

WILEY, J.—Action by appellee against appellant upon a breach of an alleged oral contract for insurance. Complaint in two paragraphs, to each of which a demurrer was overruled. Answer in denial. Trial by jury. Verdict and judgment for appellee. Motion for new trial overruled.

Overruling the demurrer to each paragraph of complaint, and the motion for a new trial are assigned as errors.

The first paragraph of complaint avers that appellant is a corporation organized and doing business as an insurance company under and by virtue of the laws of this State; that on November 9, 1901, appellee applied to appellant for insurance against loss by fire or lightning on a two-story frame dwelling-house, etc., describing its location; that it was the property of appellee, and that she applied for insurance thereon in the sum of \$800; that appellant, in consideration of appellee's paying any amount assessed against her, in proportion to the amount of insurance on said property, for the benefit of any member of the association who should sustain a loss by fire or lightning, agreed to insure appellee from 12 o'clock, noon, on November 9, 1901, to 12 o'clock, noon, on November 9, 1906, and to execute and deliver to appellee, within a reasonable time, its written policy of insurance therefor "in the usual form of policy issued by it;" that on January 17, 1902, said property, which belonged to appellee, and was of the value of \$800, was totally destroyed by fire, to her loss, etc. It is also averred that, though demanded so to do, appellant neglected and refused, and still neglects and refuses, to execute said policy in writing, pursuant to said agreement. It is also averred that appellee performed all the conditions of said contract to be performed by her,

and before the commencement of this action notified appellant of the loss. A copy of the form of insurance in use by appellant is filed as an exhibit with this paragraph. There is no substantial difference between the two paragraphs, and it therefore is unnecessary to refer to the remaining one.

The objections urged to the complaint are that neither paragraph alleges a payment of the premium, or an agreement to pay, or any definite understanding in regard to credit, or a waiver of the premium.

It has long been settled that an oral contract for insurance is valid. *Commercial Mut. Marine Ins. Co. v. Union*

Mut. Ins. Co. (1856), 19 How. 318, 15 L. Ed. 636;

1. *Franklin Ins. Co. v. Colt* (1874), 20 Wall. 560, 22 L. Ed. 423; *Potter v. Phoenix Ins. Co.* (1894), 63 Fed. 382; *Eames v. Home Ins. Co.* (1876), 94 U. S. 621, 24 L. Ed. 298; *Relief Fire Ins. Co. v. Shaw* (1876), 94 U. S. 574, 24 L. Ed. 291; *New England, etc., Ins. Co. v. Robinson* (1865), 25 Ind. 536; 16 Am. and Eng. Ency. Law (2d ed.), 852, and authorities cited.

In the volume last cited, at page 849, it is said: "The agreement of the parties must include all the elements and terms essential to the existence of the contract. If

2. the parties have not agreed on the subject of insurance, the limit and duration of the risk, the perils insured against, the amount to be paid in the event of a loss, the rate of premium, or upon any other element or term which may be peculiar to the particular contract, whatever may have been the negotiations or propositions passing between them, these have not reached the form and obligation of a subsisting contract. In other words, the negotiations must leave nothing open for future determination, but must attain the condition of a definite and complete agreement, binding the insured to pay the premium though the loss does not happen, as well as binding the insurer to pay the amount insured if the loss does happen." In support of the text just quoted numerous authorities are

cited, to which we refer without exhibiting them here. In 1 May, Insurance (4th ed.), §27, the rule is declared to be that a parol contract of insurance must have all the requisites of a written contract, to wit, subject-matter, the risks insured against, the amount insured, the duration of the risk, and the premium of insurance, and that a want of any of these facts is fatal.

Another author states the rule to be that no averment should be omitted from the complaint upon which plaintiff bases his claim, or by means of the proof of which

3. it is necessary for him to recover. 4 Joyce, Insurance (4th ed.), §3666. See, also, *Trask v. German Ins. Co.* (1894), 58 Mo. App. 431; *Perry v. Phoenix Assur. Co.* (1881), 8 Fed. 643. Ostrander, Fire Insurance (2d ed.), §415, states the rule to be that a complaint upon a contract of insurance should set forth the insurance, payment of premium, interest in the property insured, loss, and in what manner it occurred, performance of the conditions, or facts which would excuse performance, etc. It is also declared to be the rule that the premium must either be actually paid, or exist as a valid debt against the insured, in order to make the contract complete and enforceable. Ostrander, Fire Insurance (2d ed.), §8, p. 27; *Sandford v. Trust Fire Ins. Co.* (1845), 11 Paige 547.

Recurring to the complaint we find that the contract sued upon rests upon the following elements: (1) Appellee's application for insurance; (2) description of the property to be insured; (3) title of the property in appellee; (4) the amount of insurance applied for; (5) the agreement of appellant to insure appellee's property for a fixed and definite period, in consideration of her paying any amount assessed against her, in proportion to the amount of her insurance on said property, for the benefit of any member of said association who should sustain a loss by fire; (6) appellant's agreement to deliver to appellee, within a reasonable time, its written policy of insurance

in the usual form of policy issued by it; (7) the loss of the property by fire during the term of the insurance period; (8) appellee's demand and appellant's refusal to issue its policy in writing, pursuant to said agreement; and (9) performance on the part of appellee of all the conditions of said contract to be performed by her, and notice to appellant of the loss.

The copy of the form of insurance in use by appellant which is filed as an exhibit to the first paragraph

4. lends no aid to it, because it is not the foundation of the action.

The facts which we have above enumerated as they appear in each paragraph of the complaint constitute a valid contract of insurance, unless it be the absence

5. of a definite allegation as to the premium which appellee was to pay. We think it clear from the complaint that appellant is a mutual company, and while it is not specifically averred that members holding policies therein are assessed in case of loss, yet we may assume that this is true, in view of the allegation that appellant agreed to insure appellee's property in consideration of her paying "any amount assessed against her in proportion to the amount of her insurance on said property, for the benefit of any member of said association who should sustain a loss by fire," etc. In view of the above stipulation, and the averment that appellee performed all the conditions of the contract to be performed by her, we think the complaint is not open to the objections urged against it.

The questions presented by the motion for a new trial relate to the sufficiency of the evidence to sustain

6. the verdict, and to the giving, refusing to give, and modification of certain enumerated instructions.

The material facts upon which the rights of the parties must be determined are as follows: Appellee is the wife of Herbert Hogan, whom she married before his majority. John T. Phillips was Herbert Hogan's guardian, and as

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such guardian applied to appellant and obtained from it a policy of insurance upon the property in controversy. The policy was dated March 16, 1901, and by its terms covered a period between February 12, 1901, and February 12, 1906. After Herbert Hogan became of age the policy was turned over to him. He subsequently deeded the property to appellee. Appellee is the daughter of Elisha Phillips, who was one of three trustees of appellant company. At the request of appellee, said Phillips called upon the secretary of the company, told him that Herbert Hogan had deeded the property to appellee, and that she wanted a new policy issued in her name. The secretary assured Phillips that a new policy would be issued in appellee's name, and sent to her. Appellee's husband subsequently called on the secretary to see why the policy had not been issued and sent, and the secretary informed him that it was an oversight, and that he would attend to it at once. The secretary was informed by Phillips that appellee wanted the same amount of insurance as was in the old policy, and on the same property. Soon after the secretary was informed in regard to the change in the title of the property, and that appellee desired a new policy to be issued in her name, he made a memorandum upon the books of the company, as follows: "Zillah Hogan. Herbert Hogan. John T. Phillips, guardian Hogan heirs. Farmersville. February 12, 1901. One two-story frame dwelling, summer kitchen, and November 16, 1902, smoke house combined \$800 frame. Barn \$250. Total \$1,050." After the fire the secretary made upon the same book, and immediately following the above, the following memoranda: "February 22, 1902, \$800 canceled by fire 00 page 75, \$350, total \$1,475." The secretary had his attention called to the above memoranda while being examined as a witness, and was asked and answered the following questions: "Now, then, the word Zillah Hogan written up there, what do you mean by that? A. To make a change from Herbert

Hogan to Zillah Hogan. Did you intend to issue her a policy on that? A. That was my intention." Having his attention called to the memoranda on the book, dated February 22, 1902, the witness was asked and he answered the following questions: "Explain this entry to the jury on this book, dated February 22, 1902. A. I put that down to remember that it was the day of the fire. What is that entry there? A. Eight hundred dollars canceled by fire. Whose insurance was canceled by fire? A. On that house. Whose house? A. That would be Zillah Hogan's." By virtue of the constitution of appellant company it is made the duty of the secretary, among other things, to issue and countersign all policies of the association. By the constitution it is made the duty of the trustees, upon being notified of an application for insurance, to appraise the property sought to be insured, and file such appraisement with the secretary. The constitution also provides that any person who resides in a specified district may become a member of the association by signing the constitution and paying eight cents on the hundred dollars on the property sought to be insured. It is made the duty of the secretary to issue to the insured a policy as soon as the appraisement of his property is filed and accepted, and such policy must be signed by the president and secretary. It is also provided that, upon the sale of any property insured, the policy shall at once become null and void. The appellee did not pay or offer to pay, nor was any demand made upon her by appellant to pay, the eight cents on the hundred dollars on the property insured. Neither was any appraisement made of the property after the application for insurance. When the guardian of Herbert Hogan applied for insurance on the same property a short time before, the trustees made an appraisement and fixed the value of the buildings destroyed at \$800, and the policy was issued covering that sum. These facts lead to the ultimate conclusion that appellee was led to believe that she had a contract of in-

insurance with appellant indemnifying her against loss by fire. It is earnestly and ably argued by counsel for appellant that these facts, though admittedly true, do not show that any officer of the company connected with the transaction had any authority to bind appellant by the contract; in other words, that no contract was made because the one trustee and secretary could not bind the company. It is further argued that the trustees, under the constitution, are the only officers who are authorized to bind appellant by such contracts, and that in no event could a valid contract of insurance be entered into until the application of the insured is acted upon by an appraisal and acceptance by the trustees.

In the face of the facts, as exhibited by the record, we can not believe that these objections are well grounded.

The provision in the constitution requiring an ap-

7. praisement to be made by the trustees is evidently for the purpose of protecting the company against over-insurance, or fraud. This property having been appraised but a short time previously, and it not appearing that there had been any deterioration in its value, there was present no necessity for another appraisalment.

True, by the terms of the form of the policy issued by appellant, which is in evidence, the insured is required to pay as a premium eight cents on the hundred dol-

8. lars of the appraisalment of his property, and to pay all assessments against him, in accordance with the rules and regulations of the association. Appellee paid neither. But she was under no obligation to pay until the policy was issued and ready to be delivered. Appellant promised to issue the policy, but did not, though requested to do so. 1 Wood, Insurance (2d ed.), §§29, 30; 1 May, Insurance (4th ed.), §§22a, 43c; *Croft v. Hanover Fire Ins. Co.* (1895), 40 W. Va. 508, 21 S. E. 854, 52 Am. St. 902. In this case one of the trustees and the secretary acted jointly, and both of them understood that the policy

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was to be issued, and also understood the terms upon which it was to be issued. Appellant's secretary was so impressed with this fact that if there had been a loss he would have notified appellee. He so testified. Under the terms of the contract as disclosed by the evidence, there was nothing to be done except to write a new policy in the name of appellee, to conform to the terms of the old policy which became null and void, by reason of the change in title, and this, appellant, through its secretary, promised to do. The evidence amply sustains the verdict.

We have examined the instructions given by the court, those tendered by appellant and refused, and the one given as modified, and, considering them as a whole, we

9. are of the opinion that the jury was properly advised as to the law upon all the material issues in the case. It is possibly true that some of the instructions are subject to criticism, but if so they relate to minor points, and under the evidence could have no controlling influence upon the ultimate result.

As it appears from the evidence that the merits of the cause have been fairly tried and determined, and a correct result reached, under a rule repeatedly affirmed by

10. both the Supreme and this Court, and in obedience to the spirit and letter of the statute, we are required to disregard any intervening errors in giving or refusing instructions. §§401, 670 Burns 1901, §§398, 658 R. S. 1881; *Stanley v. Dunn* (1896), 143 Ind. 495.

Judgment affirmed.

WEAVER v. PREBSTER.

[No. 5,690. Filed April 19, 1906.]

1. **BILLS AND NOTES.**—*Extension of Time of Payment.*—*Principal and Surety.*—*Release.*—*Notice.*—In order to release a surety by the extension of the time of payment of a note, such extension must be for a definite time, for a valuable consideration, without the surety's consent, and the holder of the note must have notice of the fact of suretyship. p. 584.

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2. **BILLS AND NOTES.—Interest.—Prepayment.—Principal and Surety.—Release.**—The principal's payment, without the surety's knowledge, of one year's interest, on June 18, 1898, on a note executed June 26, 1897, payable, with interest, one year after date, does not release the surety, since he contracted to pay such interest. p. 585.
3. **SAME.—Extension.—Consideration.—Principal and Surety.—Release.**—The payment, on June 18, of one year's interest due on June 26, does not constitute a consideration for a contract to extend the time of payment of such note for one year from June 26. Roby, J., not concurring. p. 585.
4. **SAME.—Extension.—Consideration.—Subsequent Payment of Interest.**—The subsequent payment of the interest due upon a note constitutes no consideration for a prior contract, executed without consideration, to extend the time of payment of such note. p. 585.
5. **SAME.—Principal and Surety.—Release.—Contracts.—Mutuality.**—The surety on a note is not released by the principal's prepayment of interest, where no agreement was made for the definite extension of the time of payment of such note. p. 585.

From Hendricks Circuit Court; *Thomas J. Cofer*, Judge.

Action by Reuben Prebster, as surviving partner of the firm of R. & C. Prebster, against Ellis M. Weaver and another. From a judgment for plaintiff, defendant Weaver appeals. *Affirmed*.

Brill & Harvey, for appellant.

James L. Clark, for appellee.

COMSTOCK, J.—Action by appellee against appellant and Amos Hoak on a promissory note. The complaint seeks to recover against the defendants as joint makers. Upon proper request the court made a special finding of facts, stated conclusions of law, and rendered judgment thereon against Weaver for \$140.

The question presented by this appeal is the correctness of the conclusions of law. The only findings necessary to be set out show that Amos Hoak and Ellis M. Weaver, on June 26, 1897, jointly and severally executed the note in suit, due one year after date, with interest at eight per cent

per annum from date. Hoak executed said note as principal and Weaver as surety, and the payees had knowledge of such fact. Payments were made on said note and indorsed thereon, as follows: June 18, 1898, \$8; December 27, 1899, \$8; December 29, 1900, \$8; December 27, 1901, \$8. All of said payments were made by defendant Hoak, and Weaver had no knowledge that said note had not been paid at maturity. At each time the interest was paid it was understood by the payees that said note was to run for another year, and when the interest was paid on December 27, 1900, it was agreed by and between said Hoak and said payees that said note should run for another year. The payees never notified said Weaver that said note was unpaid until Hoak had defaulted on the interest, in the year 1902. Said note is now due and remains unpaid, except the credits indorsed thereon, and there is now due thereon the sum of \$140.40, principal, interest and attorneys' fees. As conclusions of law the court finds Weaver liable.

To release the surety upon a promissory note by reason of the extension of time of payment, the extension should be for a definite period, for a valuable consideration,

1. without the consent of the surety, and with the holder's knowledge of the fact that the party seeking the release for such cause is a surety. *Voris v. Shotts* (1898), 20 Ind. App. 220; *Arms v. Beitman* (1880), 73 Ind. 85; *Prather v. Young* (1879), 67 Ind. 480; *Starret v. Burkhalter* (1880), 70 Ind. 285; *Abel v. Alexander* (1874), 45 Ind. 523, 15 Am. Rep. 270; *Henry v. Gilliland* (1885), 103 Ind. 177; *Beach v. Zimmerman* (1886), 106 Ind. 495. The only consideration claimed by appellant for the extension is the payment of the interest in advance. The note was executed June 26, 1897, and was due June 26, 1898. On June 18, 1898, eight days before the maturity of the note, interest was paid by the principal to maturity, and at subsequent payments only the

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interest earned was paid. The interest paid on June 18, 1898, was interest which the surety had contracted to pay. It was for the year during which the note had to run. This payment could not operate as an agreement for an

2. extension of time, for it was not due until the end of the year for which such payment was made. *Jarvis v. Hyatt* (1873), 43 Ind. 163.

In *Williams v. Summers* (1874), 45 Ind. 532, the court in effect says that the payment of interest in advance is payment for the time during which payment is pro-

3. longed. An agreement made by the payees at the time referred to, in consideration of such payment to extend the time a year, would have been without consideration. The subsequent payment of interest

4. earned did not constitute a consideration binding upon the payees. *Heenan v. Howard* (1898), 81 Ill. App. 629; *Crossman v. Wohlleben* (1878), 90 Ill. 542; *English v. Landon* (1899), 181 Ill. 614, 54 N. E. 911.

The judgment of the trial court should be affirmed upon the foregoing grounds. The same conclusion should be reached for another reason, namely: In order to

5. release a surety, mutuality should appear in an agreement between the payee of a note and the principal. There is no finding of fact from which such mutuality appears, or could reasonably be inferred as to the payment of interest on June 18, 1898.

Judgment affirmed.

CONCURRING OPINION.

ROBY, C. J.—I am not prepared to say that the payment of interest before it was due may not be a sufficient consideration to support an express contract for the extension of time beyond maturity for a definite and certain period. I do not think, however, that such express contract is shown by the findings, and such payment of interest can not operate to extend the time beyond the maturity of the note, upon

which proposition the case of *Jarvis v. Hyatt* (1873), 43 Ind. 163, cited in the main opinion, is in point. The case is not authority upon the question of sufficiency of a consideration necessary to sustain an express contract, there having been no express contract for a definite time before the court.

For the reasons given, I concur in the result.

SOUTHERN INDIANA RAILWAY COMPANY v. CORPS,
ADMINISTRATRIX.

[No. 5,547. Filed February 15, 1906. Rehearing denied April 19, 1906.]

1. PLEADING.—*Complaint.*—*Contributory Negligence.*—*Railroads.*—A complaint alleging that plaintiff's decedent was unaware of the approach of defendant's train and without any fault on his part said train caused the injuries complained of sufficiently negatives contributory negligence. p. 590.
2. TRIAL.—*Burden of Proof.*—*Contributory Negligence.*—Contributory negligence is a defense in cases of personal injuries. p. 591.
3. PLEADING.—*Complaint.*—*Railroads.*—*Highway Crossings.*—*Collisions.*—A complaint showing that defendant railroad company's train struck decedent's wagon, thereby causing mortal injuries to decedent, sufficiently shows that decedent was on defendant's track. p. 591.
4. SAME.—*Complaint.*—*Knowledge of Dangers.*—*Railroads.*—*Highway Crossings.*—*Collisions.*—A complaint against a railroad company, alleging that defendant railroad company's automatic bell did not ring at the crossing; that defendant's extra came without noise on a down grade; that it gave no signal by bell or whistle, and that decedent knew nothing of such extra, sufficiently shows a want of knowledge by decedent of such danger. p. 591.
5. RAILROADS.—*Highway Crossings.*—*Duty to Make Safe.*—It is the imperative duty of a railroad company constructing or operating a railroad over a public highway to make the highway crossing safe. p. 592.
6. SAME.—*Highway Crossings.*—*Depressions.*—*Negligence.*—Railroad companies are liable for negligence in the depression of highway crossings proximately causing injuries. p. 592.

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7. TRIAL.—*Railroads.—Contributory Negligence.—Question for Jury.*—Where the evidence shows that defendant railroad company's automatic bell at a highway crossing did not ring, and decedent approached such crossing without stopping, relying upon the ringing of such bell at the approach of the train, the question of contributory negligence in view of the dangers is properly left to the jury. p. 593.
8. NEGLIGENCE.—*Contributory.—Highways.—Defects.—Notice.*—Plaintiff was not guilty of contributory negligence, as a matter of law, for using a defective highway with knowledge thereof, unless such defects were so dangerous as to forbid the highway's use by persons using ordinary care. p. 593.
9. TRIAL.—*Instructions.—Invasion of Province of Jury.—Railroads.—Signals.*—An instruction that if defendant railroad company's automatic bell did not sound at the highway crossing decedent had a right to presume the way was clear is an invasion of the province of the jury. p. 594.

From Lawrence Circuit Court; *James B. Wilson*, Judge.

Action by Emily Corps, as administratrix of the estate of George Corps, deceased, against the Southern Indiana Railway Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

F. M. Trissal, T. J. Brooks and W. F. Brooks, for appellant.

Henry P. Pearson, for appellee.

COMSTOCK, J.—Action by appellee against appellant for the killing of George Corps, her husband. The decedent was driving his two-horse team to a wagon, and while crossing appellant's track on a public highway was run into by an engine, drawing a caboose, and instantly killed. The complaint was in one paragraph, to which a demurrer for want of facts was filed and overruled. Appellants answer by general denial. There was a trial by jury, and a general verdict for appellee for \$1,400, and answers to interrogatories were returned with the general verdict. Judgment was rendered in favor of appellee, and appellants assign as errors the action of the court in overruling

its demurrer to the complaint and its motion for a new trial.

Omitting formal parts, the substance of the complaint is as follows: Appellant's road at the crossing in question is on a curve and is located on the slope of a steep hill, the top of said hill being west of said railroad track about three hundred feet and the foot of said hill being a distance of about three hundred feet east of said track. In crossing said highway said defendant company negligently failed to restore said highway to its former state, or in a sufficient manner not to impair unnecessarily its usefulness, but carelessly, in making and maintaining said crossing, so constructed it and its approaches that it interfered, at all times mentioned in the complaint, with the free use of the same, and rendered the same insecure for the life and property of the persons using said highway, and insecure for the life and property of this plaintiff's intestate, in this, to wit: that said defendant negligently failed to cut back into said hill west of said track a sufficient distance to enable any one approaching said crossing to stop within from eight to ten feet of said track, but negligently made the descent to said track from the top of said hill very steep; and was further negligent in this: that it negligently, in making said crossing and the right of way approaching the same, caused to be permitted, and negligently suffered to remain, an embankment of mud, stone and dirt from six to eight feet in height, to the north of said highway, so that by reason of said obstruction any one, and this plaintiff's decedent, approaching said crossing from the west could not see a train approaching from the north until almost on said track, and then, by reason of the steepness, could not retreat up said hill or to one side. For the purpose of warning travelers on said highway of the approach of trains at said crossing, defendant, south of said highway and a short distance east of said railway, had erected a warning bell, from four to eight inches in

diameter, which was operated by electricity, and sufficiently large to give notice, when working, to any one of the approach of a train, which bell had been in operation and kept up by said defendant for more than two years previous to the commission of the acts complained of, and of which bell and its purposes said intestate had knowledge. When said bell was in working order the approach of trains for at least six hundred feet, and probably more, from said crossing would be indicated by the loud ringing of said bell, and travelers were thus warned of the approach of trains upon all occasions except the one herein complained of. On March 21, 1904, plaintiff's intestate, in a wagon to which two horses were hitched, was upon said highway west of said railroad track on his way from his farm west of the track to the city of Bedford, Indiana, east of said track, where he had business to transact, and where he was in the habit of going to transact business. Just as he reached said crossing the defendant negligently caused one of its locomotive engines, with a caboose attached, to approach said crossing at a great rate of speed and without proper care, and negligently omitted, while so approaching, to give any reasonable or proper warning or signal, as required by statute, by reason whereof, and by reason of the other acts of negligence herein set forth, said intestate was unaware of the approach of said train, and without any fault or negligence on his part said locomotive struck his said team and wagon on said crossing, throwing plaintiff's intestate from said wagon, breaking and demolishing it, and so injuring intestate that he died almost immediately thereafter and thereby. Said wagon was broken into pieces and the horses injured. The defendant was further negligent and careless in this, to wit: that it negligently permitted said warning bell and its mechanism to get out of repair, so that at said time and for several hours theretofore it was not in working order, and failed to warn the public and this intestate of the approach of trains and the

train in particular which struck intestate, which fact the defendant well knew, or by the exercise of ordinary care might have known, and which said intestate did not know. Said bell, as alleged, did not ring at the approach of said train which struck plaintiff's intestate, which said train was an extra train, consisting of engine and caboose, and which was not running on schedule time, but which on said day followed about twenty-five or thirty minutes behind the morning south-bound passenger-train. Plaintiff's intestate knew that said passenger-train had passed, and knew nothing of said extra. Defendant had been warned of the dangerous character of said crossing, and had failed to remedy the same. It had at least two years warning. The failure to ring said bell was an invitation to the public in general, and an invitation in particular to this plaintiff's intestate, to approach said track, and was assurance that there was no danger from approaching trains, and by such failure this plaintiff's intestate was lulled into a sense of security, and into believing that there was no danger. Said locomotive and caboose, as it approached said crossing, was going down a steep grade toward said crossing, and said engine was not working steam, and said train was moving in a noiseless manner, without blowing the whistle or ringing the bell as required by law. Plaintiff's intestate was an able-bodied man, seventy-two years of age, was industrious, and able to earn and did earn about \$1,000 a year. Said wagon, so destroyed, was of the reasonable worth of \$50. The damage to said horses was \$50, etc.

The first objection urged against the complaint is that "it does not say that decedent exercised any care whatever when approaching and going upon the crossing—he

1 did not look or listen." The complaint alleges that the decedent "was unaware of the approach of said train, and without any fault or negligence on his part said locomotive struck his said team and wagon on said crossing, throwing this plaintiff's intestate from said wagon," etc.

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It is not now necessary in an action of this character to allege freedom from contributory negligence. Acts 1899, p. 59, §359a Burns 1901; *Nichols v. Baltimore, etc., R. Co.* (1904), 33 Ind. App. 229. But the foregoing averment is sufficient if it were still necessary to plead freedom from contributory negligence.

It is next urged against the complaint that it does not show, by way of averment, that the deceased went upon appellant's track at all. It does allege that "with-

3 out any fault or negligence on his part said locomotive struck his said team and wagon on said crossing, throwing this plaintiff's decedent from said wagon, breaking and demolishing said wagon, and so mutilating and injuring said intestate that he died almost immediately thereafter and thereby." The statement that the locomotive struck his said team and wagon and threw him from the wagon is a sufficient allegation that the decedent had driven on the track.

Other objections to the complaint are that it does not aver that the decedent was unaware of the approach of the train when he went on the track, or at any time

4. before he went on the track; that his ignorance is not connected with any time related to the accident; that it does not say that his being unaware of the train was caused by the failure to blow the whistle or ring the bell of the locomotive; that there is no connection shown between his condition of mind and the alleged failure to sound the signals; that there is no connection shown between the accident and the bell or its failure to ring; that there is no averment that decedent was misled by the failure of the crossing bell to ring, nor that had the bell at the crossing rung, he would have been warned of the approach of the train and not have driven upon the track into danger, nor that had any of the bells or whistles sounded he would have heard them, and would not have driven on the crossing.

The complaint alleges that he knew nothing of said extra which caused his death. In a few lines preceding said statement it is alleged that the warning bell did not ring at the approach of said train which struck plaintiff's intestate, thus connecting the ignorance of the decedent of the approach of the train with the time of the accident. The complaint further alleges that the decedent was unaware of the approach of the train because of the failure to blow the whistle or to ring the bell, "and just as he reached said crossing it carelessly and negligently caused one of its locomotives, with a caboose attached, to approach said crossing, * * * by reason whereof and by reason of said acts of negligence herein set forth said intestate, George Corps, was unaware of the approach of said train," etc.; "that its [the crossing bell's] failure so to ring was an invitation to the public in general, and an invitation in particular to this plaintiff's intestate, to approach said track, and was assurance that there was no danger from approaching trains, and that thereby plaintiff's intestate was lulled into a sense of security, and into believing that there was no danger."

The demurrer was properly overruled.

"Appellant, in the construction of its railroad, having intersected an established highway, it became its imperative statutory duty to restore the highway thus intersected, to its former state, or in a sufficient manner not unnecessarily to impair its usefulness, and in such manner as to afford security for life and property." *Chicago, etc., R. Co. v. Leachman* (1903), 161 Ind. 512. And see *Chicago, etc., R. Co. v. State, ex rel.* (1902), 158 Ind. 189; §5153 Burns 1901, §3903 R. S. 1881.

This duty is averred in the complaint to have been neglected by the appellant, by failing to cut back into the hill a sufficient distance to enable the traveler to stop

6. before reaching the crossing, and by permitting an embankment to remain at the north of said high-

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way, thereby obstructing the view of approaching trains. In the case of *Chicago, etc., R. Co. v. Leachman, supra*, injuries were suffered by a traveler whose team and wagon went over an embankment leading to a railroad track. In the case at bar the injuries complained of were alleged to have been caused by a railroad track's crossing a highway below the grade, to which objection is made as aforesaid. The plaintiff's right to recover for injuries, of which the violation of such statutory duty was the proximate cause, is no different, because of the fact that the movement of the passing train contributed to such injury, from what it would be had he driven off of an embankment. *Lake Shore, etc., R. Co. v. McIntosh* (1895), 140 Ind. 261.

Appellant had, prior to the accident, erected an electric alarm bell, by which notice of approaching trains was automatically given. This apparatus was out of repair,

7. and did not ring for the train by which decedent was killed. It is shown that he was familiar with the crossing. There is evidence tending to show that he did not stop as he approached it, although, in view of the presumption, in the absence of evidence of the fragmentary character of that produced upon the subject, and the verdict with its implications, this can not be regarded as an established fact. The decedent was not compelled to abandon travel upon the public highway although he knew its dan-

8. gerous condition, but had a right to use it if the defect was not one which rendered it obvious to a person of ordinary understanding that it could not be encountered without injury. *Chicago, etc., R. Co. v. Leachman, supra*. If in the use of such highway he exercised the care of a reasonable and prudent person, under the circumstances he was not guilty of contributory negligence. *Chicago, etc., R. v. Leachman, supra*. It is manifest that his conduct can not be determined by mere reference to his failure to see or hear and avoid the approaching train, which may have been somewhat obscured. Having once entered upon the

descending road, his conduct as to stopping must be considered in connection with the difficulties of so doing, so that whether he exercised due care was a question upon which no one but the jury is competent to pass. We can not say, as a matter of law, that he had a right to rely upon the automatic bell, and that its failure to ring is conclusive of due care on his part. The fact that such a bell had been provided, decedent's knowledge of and reliance thereon, were relevant facts, the weight of which was for the jury in connection with the other circumstances and proof. Decedent had an undoubted right to rely, to some extent, upon the signal's being given in accordance with the custom; but whether, in spite of its omission, he learned or ought to have learned of his danger, is a mixed question of law and fact.

In the third instruction given at the request of appellee, the jury were told that if the automatic bell did not sound, appellant's decedent had a right to presume that the

9. way was clear. In this the court erred. Such failure is not in itself sufficient to justify an indifference to other means of warning, but it is only a circumstance to be taken into consideration in determining whether due and proper care was exercised. *Cleveland, etc., R. Co. v. Heine* (1902), 28 Ind. App. 163; *Cleveland, etc., R. Co. v. Harrington* (1892), 131 Ind. 426; *Pennsylvania Co. v. Stegemeier* (1889), 118 Ind. 305, 10 Am. St. 136; *Baltimore, etc., R. Co. v. Conoyer* (1898), 149 Ind. 524; *Louisville, etc., R. Co. v. Williams* (1898), 20 Ind. App. 576; *Cleveland, etc., R. Co. v. Coffman* (1903), 30 Ind. App. 462. The instruction invaded the province of the jury, and therein exists a necessity for a reversal of the judgment.

Other questions argued will not likely arise upon a subsequent trial and will not, therefore, be further considered.

Judgment reversed and cause remanded, with instructions to sustain appellant's motion for a new trial, and for other proceedings not inconsistent herewith.

Greer-Wilkinson Lumber Co. v. Steen—37 Ind. App. 595.

GREER-WILKINSON LUMBER COMPANY v.
STEEN ET AL.

[No. 5,554. Filed April 19, 1906.]

PLEADING.—*Sustaining Motion to Strike Out Material Parts.—Harmless Error.—Mechanics' Liens.*—Sustaining a motion to strike out all averments of a complaint asking for the enforcement of a mechanic's lien and the notice of intention to hold a lien is harmless error where on the trial it is found that defendants owed nothing to plaintiff on account of the claim sued on.

From Delaware Circuit Court; *Joseph G. Leffler*, Judge.

Suit by the Greer-Wilkinson Lumber Company against Joseph M. Steen and others. From a decree for defendants, plaintiff appeals. *Affirmed.*

F. F. McClellan and *Donald D. Hensel*, for appellant.

George H. Koons, for appellees.

MYERS, J.—This is a suit commenced by appellant against appellees in the Delaware Circuit Court, demanding personal judgment and the foreclosure of a mechanic's lien. From a decree in favor of appellees, appellant prosecutes this appeal.

The errors relied upon for a reversal are grounded upon the ruling of the court in sustaining the separate motion of Joseph M. and Priscilla A. Steen to strike out parts of its complaint.

From the complaint it appears that prior to the month of June, 1903, the Heekin Park Company was the owner of lot eighty-eight in Galliher's subdivision, an addition to the city of Muncie, Indiana, and had entered into a contract with Steen and Steen, whereby they agreed to purchase from said company said lot, or some part thereof. Pursuant to said contract, which is still in full force and effect, the Steens took possession of the lot and have paid various sums on account of the purchase price

thereof. During said month of June the Steens contracted with and procured from appellant certain materials for the construction of a fence on this lot, and for that purpose the same was furnished by appellant and so used. Said materials are shown by a bill of particulars filed as an exhibit with the complaint, and are averred to be of the value of \$35. On August 28, 1903, appellant filed in the recorder's office of Delaware county, Indiana, a notice to appellees of its intention to hold a mechanic's lien. The only defect pointed out in this notice is in the description of the real estate upon which the fence was erected. In the notice it is described as the west half of lot eighty-nine in Galliher's subdivision, an addition to the city of Muncie, Indiana, when, as the complaint avers, in truth and in fact, the fence was erected on lot eighty-eight in the same addition, and upon which it was the intention of appellant to give notice of its intention to hold a mechanic's lien, and the court is asked to reform and correct the notice of lien so filed and recorded, and for a foreclosure of the same, and sale of the property, etc.

The action of the court in sustaining the motions of Steen and Steen to strike out eliminated from the complaint the notice of intention to hold a lien, filed therewith as an exhibit, as well as all the averments necessary to sustain its right of foreclosure, thereby leaving appellant to enforce its claim by personal judgment. The complaint, after the parts were stricken out, is sufficient for this purpose. Appellees' answer in general denial tendered the issue of the validity of its claim. From the bill of exceptions it appears that, all parties being present by counsel, the issue thus tendered was submitted to the court for trial without the intervention of a jury. Evidence was introduced on the part of Joseph M. and Priscilla A. Steen, at the conclusion of which the court made a general finding in favor of appellees and against appellant, and rendered the following judgment: "It is therefore considered and

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adjudged by the court that the plaintiff take nothing by its action, and that the defendants recover of the plaintiff their costs and charges, in this cause laid out and expended, taxed at \$——.” The bill of exceptions also shows that, at the time the court sustained the motions to strike out, appellant gave notice to the court that it refused to plead further, and would appeal to the Appellate Court of the State of Indiana upon the questions of law reserved upon exceptions to the court’s ruling on the motions to strike out parts of its complaint.

It is clear from the averments of the complaint that the claim of appellant growing out of this transaction is the indebtedness of the Steens. The finding and judgment of the court on that issue were in their favor. The purpose of the lien is to enable the lien holder to coerce payment of the claim. Without a valid claim there can be no lien. If there was no indebtedness or liability on the part of the Steens to pay for the materials so furnished and used, appellant’s remedy, given by the lien, would also be ineffective. It is a familiar rule that all reasonable presumptions are to be indulged by appellate tribunals in support of the proceedings of the trial court, and not until material error, which operated to appellant’s injury, is affirmatively shown to have been committed, will its judgment be disturbed. *Shugart v. Miles* (1890), 125 Ind. 445, 450; *Ewbank’s Manual*, §254.

As said in *Shugart v. Miles, supra*: “The record must be so made up as clearly to show the rulings to exclude the presumption referred to, and to make it affirmatively appear that the rulings were harmful to the appellant.” Applying this rule to the case at bar, the record shows that appellant had no valid, existing claim, the payment of which it was entitled to enforce by foreclosure and sale of the property upon which it claimed a lien. This being true, the ruling of the court on the motions became immaterial and harmless. Had appellant, upon the trial, succeeded in estab-

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lishing its claim, then the ruling of the court, assuming that it was erroneous, would have been material, because by such ruling a remedy to which appellant was entitled was thereby denied.

The record presents no available error. Judgment affirmed.

EVANSVILLE & TERRE HAUTE RAILROAD COMPANY
v. MILLS.

[No. 5,672. Filed April 20, 1906.]

1. CARRIERS.—*Passengers.*—*Live-Stock Attendant.*—An attendant riding on a freight-train in the car with his live stock, which is shipped under a contract for a fixed charge, including passage to the owner or attendant, is a passenger for hire. p. 601.
2. TRIAL.—*Pleading.*—*Proof.*—*Variance.*—Plaintiff must recover *secundum allegata et probata.* p. 602.
3. SAME.—*Railroads.*—*Collisions.*—*Questions for Jury.*—*Evidence.*—Where the evidence showed that plaintiff, a live-stock attendant on a freight-train, was injured while his car was standing on the track, by a terrible jar which threw him against the car rendering him unconscious, the question whether such jar was caused by defendant company was for the jury. p. 603.
4. SAME.—*Evidence.*—*Inferences.*—It is not essential for plaintiff to prove every allegation of his complaint by direct and positive evidence, since the jury has the right to draw reasonable inferences from the facts proved. p. 603.
5. SAME.—*Railroads.*—*Passengers.*—*Injuries.*—*Res Ipsa Loquitur.*—Injury to plaintiff while a passenger for hire on defendant's railroad establishes a *prima facie* case of negligence, and the defendant, to escape liability, must show that such injury could not have been avoided by the highest practical care. p. 604.
6. RAILROADS.—*Passengers Riding in Freight-Car.*—*Contributory Negligence.*—*Assumption of Risk.*—A live-stock attendant riding, by contract, on the car containing such stock neither assumes the risks of defendant's negligence, nor is he guilty of contributory negligence. p. 605.

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7. **TRIAL.—Evidence.—Custom.—Railroads.**—Admitting the testimony of two witnesses, over objection, that they rode in stock-cars as attendants of live stock on defendant's road, if erroneous, was harmless. p. 607.
8. **SAME.—Instructions.—Contributory Negligence.—Burden of Proof.**—An instruction, that the burden of proof in a personal injury case is on defendant and defendant must establish same by a preponderance of the evidence, though erroneous, is not reversible where the court further instructed that if the jury find that the plaintiff was guilty of any contributory negligence he cannot recover. p. 607.
9. **SAME.—Instructions.—Refusal.—Point Already Covered.**—It is not error to refuse to give instructions on a branch of the case already covered by proper instructions. p. 609.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

Action by Alfonzo Mills against the Evansville & Terre Haute Railroad Company. From a judgment on a verdict for plaintiff for \$1,775, defendant appeals. *Affirmed*.

John E. Iglehart, Edwin Taylor, Eugene H. Iglehart, W. W. Moffett and J. W. Emison, for appellant.

J. T. Kingsbury, W. A. Cullop and George W. Shaw, for appellee.

WILEY, J.—This is an appeal from a judgment in appellee's favor, growing out of injuries received while riding on one of appellant's freight-trains, the action being based on the latter's alleged negligence. His complaint is in two paragraphs, to each of which a demurrer was overruled. The cause was put at issue by an answer in denial. Appellant's motion for a new trial was overruled.

By the assignment of errors the sufficiency of each paragraph of the complaint and the overruling of the motion for a new trial are presented for review.

Omitting the formal parts of the first paragraph of the complaint, it alleges that on September 18, 1903, one Pinkstaff had certain fine blooded cattle that he desired to have shipped from Huntingburg to Vincennes, Indiana; that he entered into a written contract with the Southern Railway

Company for the shipment of the same at a fixed rate; that such contract was made on behalf of the Southern Railway Company and such connecting lines as might accept the terms of the contract, and to carry on freight-trains in charge of the cattle the shipper's agent, who was the appellee; that the cattle and appellee were transported under the terms of the contract by the Southern Railway Company to Princeton, where the tracks of that company and appellant's tracks connected, and at which place the Southern Railway Company delivered to appellant the car in which said cattle were being transported; that appellant there received the car of cattle in which appellee was being carried as a passenger, attached the same to one of its trains, accepted the terms of the contract, and undertook and agreed safely to carry the appellee in the car as a passenger from Princeton to Vincennes; that it failed to do so, but on the contrary, while in transit and while appellee was a passenger on its train in said car, the train was stopped, and while standing upon the track, appellant, negligently and with great force, ran another car, propelled by a locomotive engine, against, upon and into the train in which appellee was riding, whereby, without his fault, he was injured, etc. The contract of shipment is made an exhibit to the first paragraph of the complaint.

The second paragraph avers that appellant owned and operated a line of road between Evansville and Terre Haute, Indiana, and that it was a common carrier of passengers and freight for hire; that on September 19, 1903, appellee took passage as a passenger on one of appellant's trains at Princeton, to be carried to the city of Vincennes, on appellant's road; that as such passenger he paid the fare between said two stations; that at a point between said two stations the train upon which he was riding stopped upon the track, and while standing thereon appellant, with great force and violence, ran another car, propelled by a locomotive engine, against, upon and into it, by reason of

which the car in which appellee was riding was suddenly started and jerked, and without any fault on his part he was thrown against the car and fixtures, knocked down, and rendered unconscious, to his injury, etc.

By the contract of shipment, which is made an exhibit to the first paragraph of complaint, it is shown that while the destination of the cattle was Vincennes, the Southern Railway Company agreed to carry them only to Princeton. This contract also provided for free passage for the shipper's agent on the train with the cattle. While the contract does not prescribe any specific place where appellee should ride, it does provide that he should ride "upon the freight-train in which the animals are transported."

The objection urged to the complaint is that there is no averment in either paragraph that creates the relation of carrier and passenger, and that the first paragraph

1. sufficiently shows that appellee, without reasonable excuse, and without the knowledge of appellant, placed himself in the car with the cattle, where he voluntarily assumed a place of recognized danger and the hazards attaching to such place. This objection is not well taken. The learned counsel for appellant have cited and reviewed many authorities in support of the objections urged to the complaint. We have examined them, but it would be an unnecessary waste of time to review them here, in view of the fact that it has long been held in this State, and it is now the fixed rule of law, that a person in charge of live stock being transported by a common carrier, under a contract, and for a fixed charge to transport such live stock, and where such contract provides that the carrier will afford free passage to the owner of the stock, or his agent, on the train carrying the cattle, is a passenger for hire. It is specifically averred in the first paragraph of the complaint that one Pinkstaff entered into a contract with the Southern Railway Company and its connecting lines to carry certain stock from Huntingburg to Vincennes, Indi-

ana, and that appellant accepted the terms of the contract and undertook and agreed to carry safely the appellee in the car as a passenger. The first paragraph of the complaint clearly shows that appellee was a passenger for hire. This exact question was considered and decided by this court in the recent case of *Southern R. Co. v. Roach* (1906), 38 Ind. App. —. The following case is also in point: *Lake Shore, etc., R. Co. v. Teeters* (1906), 166 Ind. 335. In the case last cited the rule is so fully discussed and the authorities in support of it so fully marshaled, that we conclude that the question now under consideration is no longer a debatable one in this State. The demurrer to each paragraph of the complaint was correctly overruled.

Under its motion for a new trial appellant has presented, and its counsel have ably discussed in their brief, four questions: (1) That the verdict is not sustained by sufficient evidence, and is contrary to law; (2) that the court erred in admitting certain evidence; (3) that the court erred in giving to the jury certain instructions; (4) that the court erred in refusing to give certain instructions tendered by appellant. Counsel for appellant contend that there is a total failure of proof of the negligence charged, viz., that, while the train upon which appellee was riding was standing still, appellant "carelessly and negligently, and with great force and violence, and upon the same track, ran another car propelled by a locomotive engine against, upon, and into the train of cars upon which the plaintiff was riding."

Counsel refer to the well-established rule that a plaintiff must recover according to the allegation of his complaint, or not at all; and that he can not recover on evidence which makes a case materially different from the case made by the pleading. The rule as stated is the law in this State, and if the facts in this case bring it within that rule, then appellee can not recover. The

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only evidence which pertains to the cause of the

3. accident is that of the appellee himself. He testified that after the train stopped at Purcells, the engine went back on the side-track; that he noticed that one of the heifers had become untied; that he tied her up, and just as he finished doing so a sudden jar came, "just like a shock of dynamite;" that it jarred the train; that he could not tell where it came from, the front or back of the train. He was asked and answered these questions: "Then where did it go? A. I don't know where it went after that. I know a sudden jar came and I did not know anything after that. Do you know what jarred you? A. No, sir; I don't. Do you know whether it was the engine that jarred you? A. No, sir; it was a jar, I know that. Do you know where that jar came from? A. I do not. At this time you are unable to say where the jar came from? A. Yes, sir." He also testified that the jar was so great that he was thrown against the side of the car, from the effect of which he became unconscious, and that he did not regain consciousness until about the time the train arrived at Vincennes. He also testified that two of the cattle were knocked down, from the effect of which they died. From this evidence two facts are plainly apparent: (1) That there was a sudden and violent jar of the train; and (2) that appellee's injury resulted therefrom. It is quite true, as is contended by counsel, that this evidence does not, in express terms, establish the act of negligence charged, but it does form a basis for all reasonable inferences deducible therefrom, and it was the province of the jury to draw such inferences.

4.

By such evidence and such inferences the jury doubtless reached the conclusion that the collision was occasioned by the careless operation of the locomotive, as alleged in the complaint. This they were authorized to do. It is not essential that every material fact upon which a plaintiff grounds his cause of action must be established by direct and positive evidence, to entitle him to recover.

On the contrary it is the legitimate province of a jury or court trying a cause to draw reasonable inferences from proved facts and circumstances. *Princeton Coal, etc., Co. v. Roll* (1904), 162 Ind. 115. Under the evidence, the violent jar of the train could only have resulted from the application of some great force, or artificial agency. The train was under the control, management and operation of appellant. It was standing still on appellant's track. The engine that propelled it had been detached. It could not have proceeded upon its journey unless the locomotive engine had again been attached to it. That it did proceed is sufficient evidence of the fact that it was so attached. These facts make the inference and conclusion reasonable that the jar of the train was caused by the locomotive engine's coming in violent collision with it. It was not essential for appellee to show, by direct and positive evidence, that the collision was caused by running another car, propelled by a locomotive engine, against the train.

As we have seen, appellee was a passenger for hire, and, this being true, the fact that he was injured while such passenger is *prima facie* evidence of appellant's
5. negligence. *Indianapolis St. R. Co. v. Schmidt* (1904), 163 Ind. 360; *Cleveland, etc., R. Co. v. Newell* (1885), 104 Ind. 264; *Brighton v. White* (1891), 128 Ind. 320; *Terre Haute, etc., R. Co. v. Sheeks* (1900), 155 Ind. 74, and cases cited. It is true the burden is upon the passenger to maintain and establish the affirmative of the issue, yet under such conditions as are here presented, the mere happening of the accident is at least *prima facie* evidence of negligence upon the part of the carrier, and in such case it is incumbent upon the latter to produce evidence that will excuse the *prima facie* failure of duty on its part. To state the rule more forcibly, it may be said that the burden is upon the carrier, under such circumstances, to prove, in order to rebut the presumption of negligence, that the accident could not have been avoided

by the exercise of the highest practical care and diligence. *Terre Haute, etc., R. Co. v. Sheeks, supra*. This, appellant has failed to do. There is not such a variance between the act of negligence charged and the evidence, in connection with the reasonable inferences deducible therefrom, as to defeat a recovery.

Under the facts in this case, appellee's right to recover can not be defeated by reason of the fact that he was riding in a freight-car with the cattle in his charge, instead

6. of in a caboose. His riding there, under the undisputed facts, would not make him guilty of contributory negligence, nor exempt appellant from liability under the doctrine of assumed risks. It is assumed by counsel for appellant that appellee was riding in the stock-car without the knowledge or acquiescence of appellant or its servants. This assumption is not tenable. The contract granted to appellee free passage, "on the train with the animals." It required of him certain duties and responsibilities, in that he was to attend the stock while on cars, water and feed the same, and to that end the contract provided that the owner of the stock "or his agent in charge of said live stock shall ride upon the freight-train in which said animals are transported." The contract further provided that the shipper should furnish, at his own expense, "such bedding or other suitable appliances in said car, * * * as will enable said live stock to stand securely on their feet while in the same." It further exempts appellant from liability from "the burning of hay, straw or other material used by the party of the second part, or his agent, for food or bedding for said live stock." The contract does not designate or require the person accompanying the stock to ride upon any particular part of the train. The evidence shows that the stock that was being transported was valuable blooded stock, and being taken to Vincennes for exhibition at a fair. The evidence also shows that there was hay and straw in the car, for bedding and feed. This

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is combustible matter and easily set on fire by sparks, etc. It is also shown, by uncontradicted evidence, that it was necessary for appellee to be in the car at the very moment of the accident, because one of the heifers had become loosened from her tether, and just as he had finished tying her up again he was injured.

In the case of *Lake Shore, etc., R. Co. v. Teeters* (1906), 166 Ind. 335, the contract of shipment was in all essential respects like the one in this case. While the contract in that case, as here, was made by the initial carrier for itself and on behalf of connecting carriers, the court, in referring to it, said: "This contract, in and of itself, was sufficient to charge appellant with notice that appellee was on its train in charge of the stock, and the failure to account for him in the caboose would plainly lead to the inference, in view of the duties and responsibilities resting upon appellee, that he was actually in charge of the stock." Again in that case the court said: "Since appellee, by his contract, had absolved appellant from its common-law responsibility for the safety of the stock, aside from the risk of transportation, it is clear, the stock being valuable, that he had a right, in the absence of any known requirement to the contrary, to be on hand at all times to protect the property from those dangers which he had absolved the carrier from, and which, as a consequence, were risks which devolved upon him, and if he had a right to be present at all times to protect the property, he is not to be accounted a wrongdoer because, for convenience or otherwise, he elected to stay in a place where he had a right to be."

In the case of *Illinois Cent. R. Co. v. Beebe* (1898), 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253, it was held that where a freight-train, after stopping, is suddenly started, thereby injuring a passenger lawfully on the train in charge of stock, as required by his shipping contract, a jury was justified in finding the carrier negligent, if it was shown that the passenger was using ordinary care.

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In the case before us, the jury, by their general verdict, found, and such finding was within the issues, that appellant was guilty of negligence, and that appellee was using ordinary care. See, also, *Lawson v. Chicago, etc., R. Co.* (1885), 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

By reasons properly assigned in its motion for a new trial, appellant predicates error upon the admission of evidence of two witnesses, to the effect that they

7. had ridden in stock-cars, with live stock, upon appellant's road. The objection urged to this evidence is that the law inhibits a shipper from riding in the car with the cattle, except that he does so by assuming any increased hazards, and that any custom of appellant in allowing the shipper to ride with the cattle "can not break down or affect this rule of law." In view of what we have said in regard to appellee's right to be in the car in attendance upon the cattle, it is unnecessary for us to decide the question thus raised by the motion for a new trial. If the evidence was inadmissible, the error in letting it go to the jury was harmless.

The court on its own motion gave the following instructions: "(7) The law of this State does not require the plaintiff to prove that his alleged injuries were

8. incurred by him without contributory negligence upon his part; but contributory negligence on the part of the plaintiff is a matter of defense, and such defense may be proved under an answer of general denial.

"(8) In cases of this kind, if contributory negligence of the plaintiff is claimed by the defendant, the burden is cast upon the defendant of proving such contributory negligence by a preponderance of the evidence.

"(9) Negligence consists in the doing or omitting to do some act which a person in the exercise of ordinary care and prudence would not do or omit to do, and which act if done or omitted by him, contributed and helped to produce the injury complained of; and if the jury find from a

preponderance of the evidence that the plaintiff, Alfonso Mills, committed any act which under the law he should not have committed, and which act contributed to or helped to produce the injuries of which he complains, then he can not recover in this action."

It is argued that under the ruling in *Pittsburgh, etc., R. Co. v. Lighthouse* (1904), 163 Ind. 247, *Indianapolis St. R. Co. v. Taylor* (1902), 158 Ind. 274, and *Pittsburgh, etc., R. Co. v. Collins* (1904), 163 Ind. 569, it was error to give these instructions. The objection urged is that the court told the jury that the burden of proving contributory negligence was upon appellant. The three instructions pertain to the same subject-matter, and should be construed together. No objection is urged to the seventh and the ninth, and we are unable to detect any. Under the rule declared in the cases cited, the eighth instruction, standing alone, would have to be held erroneous, but in neither of those cases was there any other instruction which modified or explained the naked statement that the burden of proving contributory negligence was cast upon the defendant, which carried with it the necessary inference that such proof must be adduced by the defendant. Not so here, for in the ninth the court told the jury that if they found from a preponderance of the evidence that appellee did anything or omitted to do anything that contributed to his injury, he could not recover. And again, in an instruction given on appellant's motion, the court told the jury that "It is for you to determine from the evidence in the case whether the plaintiff was or was not guilty of negligence which contributed to his injury," etc. It would be imputing dense ignorance to the jurors to say that they must have understood that by the expressions "from a preponderance of the evidence," and "from the evidence in the case," the court meant less than all the evidence upon the subject of contributory negligence, regardless of its source.

In *Indianapolis St. R. Co. v. Taylor*, *supra*, the court

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said: "It is sufficient to call attention to the inaccuracy of any instruction that requires in express terms, or impliedly, that the contributory negligence of a plaintiff must be proved by the defendant. The jury should be informed that it is sufficient if the contributory negligence of the plaintiff is proved by a preponderance of the evidence, without regard to whether such evidence was given by the plaintiff or defendant, or by both." This is just what the trial court did in the case at bar, in two instructions. See *Indianapolis, etc., Transit Co. v. Haines* (1904), 33 Ind. App. 63; *New Castle Bridge Co. v. Doty* (1906), *ante*, 84. We think the instructions to which we have referred correctly state the law, and that the jury was not misled by number eight, when considered with the others.

Other instructions given by the court, and those tendered by appellant and refused, relate largely to the fact that appellee was riding in the freight-car instead of the

9. caboose. Those given upon that branch of the case are in harmony with what we have said as to appellee's right to be in and ride in the car with the stock, and they are approved. Those refused declare a contrary rule, and hence were correctly refused.

Judgment affirmed.

GILMAN v. FULTZ.

[No. 5,537. Filed April 20, 1906.]

1. PLEADING.—*Complaint.*—*Sufficient as to Part of Claim.*—A complaint sufficient as to any portion of the demand will withstand a demurrer for want of facts. p. 611.
2. SAME.—*Complaint.*—*Usury.*—*Recovery.*—A complaint for the recovery of usurious interest paid to defendant, which alleges that plaintiff borrowed \$30 for 30 days and that defendant collected plaintiff's wages and retained such sum together with \$10 additional as usurious interest, is sufficient. p. 611.

From Elkhart Circuit Court; *Joseph D. Ferrall*, Judge.

Action by Isaac Fultz against Henry Gilman. From a judgment for plaintiff, defendant appeals. *Affirmed*.

James L. Harman, Edward B. Zigler and Elias D. Salisbury, for appellant.

J. D. Osborne, for appellee.

ROBINSON, J.—Action by appellee to recover alleged usurious interest. The sufficiency of the complaint as against a demurrer for want of facts is the only question presented.

The complaint avers, in substance, that appellee is an employe of a railway company; that appellant is engaged in loaning money to railroad employes at usurious rates of interest and taking assignments of their pay to come due as security for such loans; that about January 1, 1898, appellee applied to appellant for a loan of money; that appellant loaned to him \$30, for which appellee gave his note due in thirty days, and as security therefor gave to appellant an assignment of his wages to come due on the 20th day of that month; that the amount due appellee on that date was \$85.99, which appellant drew from the company upon such order, and when the note became due appellant retained the amount thereof, and also \$10 more as usurious interest thereon, out of the money so received, and paid the residue thereof to appellee; that at that time appellant loaned to appellee the sum of \$30, and in like manner took an assignment of appellee's pay to come due on the 20th day of February next ensuing, as security therefor, which amount was \$54.50, and which sum appellant then drew from the company on such order, and when such note became due appellant retained and kept the amount thereof, and \$7 more as usurious interest from the money so received. The complaint avers a number of similar transactions subsequently had between appellant and appellee, extending over a period of time. It is further

averred that appellee could not give an itemized statement of the notes so given by him, for the reason that he kept no written memorandum thereof; but it is averred that appellant made such memorandum in a book kept by him which contained an account of the transactions with appellee. It is further averred that in the aggregate appellant, in the manner stated, drew and obtained more than \$3,000 of appellee's wages and pay, and kept and retained \$450 therefrom as usurious and unlawful interest on the notes so given by appellee to the appellant, and that there is now due and owing from appellant to appellee the sum of \$450 and interest thereon.

It is argued that the complaint does not aver what the usurious contract was; that it does not appear what rate or amount of interest was taken or secured. As to

1. some of the amounts of alleged usurious interest the complaint is insufficient; but, if the pleading avers sufficient facts to entitle appellee to some relief, it is good against the demurrer.

It appears that the first loan that was made was for \$30 for thirty days, thus fixing the sum on which the alleged usurious interest was charged and the time. It

2. further appears that within this thirty days appellant collected appellee's wages, and that when the note became due he retained the "amount thereof, and \$10 more as usurious interest thereon, out of the money so received, and paid the residue thereof" to appellee. It is not material whether the pleading is held to mean that appellant retained simply the face of the note, or the face of the note and interest and \$10 additional as usurious interest. If appellant retained \$10 as interest on a thirty-day note for \$30, a part of that sum was usurious, and it is immaterial whether the pleader characterizes it as usurious or not. The wages were assigned as security for the loan, and when the note became due, had appellee paid the amount due it would have been appellant's duty to pay the

amount of the wages held by him to appellee, and this without any demand. It is true that appellant rightfully collected the money and so held it until the note became due, but he could not rightfully hold, after the note became due, more than was sufficient to pay the amount due on the note. The pleading, we think, sufficiently shows that he did retain the face of the note, and in addition a sum in excess of the interest permitted by law. This excess he did not rightfully hold. While appellee might have been required to make the complaint more specific, yet we think it pleads sufficient facts to entitle appellee to a judgment in some amount. It is true the pleading does not state the rate of interest, but it does state the sum loaned and for what time and the amount retained as interest, and from these facts it appears that a part, at least, of the sum retained as interest was in excess of the interest which the law authorizes to be charged for the use of money. We have examined the cases cited by appellant's counsel, but find nothing in them in conflict with the view here taken.

Judgment affirmed.

McNULTY v. THE STATE.

[No. 5,837. Filed January 10, 1906. Rehearing denied April 20, 1906.]

1. NOTARIES PUBLIC.—*De Facto*.—*Official Acts*.—*Abatement*.—*Collateral Attack*.—Where a notary public who accepts the office of deputy prosecuting attorney and who, after the expiration of such latter office, swears affiant to an affidavit charging defendant with the commission of a crime, such official act whether *de jure* or *de facto* can not be attacked by a plea in abatement to such criminal charge. p. 615.
2. SAME.—*Attorney and Client*.—*Attorney Swearing Client*.—*Abatement*.—A plea in abatement does not lie to the charge of misdemeanor because the notary swearing affiant to the affidavit charging such crime was also attorney for the prosecution. p. 616.

McNulty v. State—37 Ind. App. 612.

3. **APPEAL AND ERROR.**—*Appellate Court Rules.—Briefs.*—Where appellant fails to set out in his brief the instructions questioned, in terms or in substance, all questions thereon are waived. p. 616.

From Hamilton Circuit Court; *Ira W. Christian*, Judge.

Prosecution by the State of Indiana against Charles O. McNulty. From a judgment of conviction, defendant appeals. *Affirmed.*

John F. Neal and *J. F. Beals*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *L. G. Rothschild* and *William C. Geake*, for the State.

BLACK, P. J.—This was a prosecution upon affidavit and information for selling intoxicating liquor at an unlawful hour, it being charged that the appellant, on or about, etc., at, etc., “did then and there, between the hours of 11 o’clock p. m. of such day, and 5 o’clock a. m. of the succeeding day, unlawfully sell to Frank Burkhart, at and for the sum of thirty-five cents, certain intoxicating liquor in less quantity than a quart at a time, to be then and there drank by said Frank Burkhart as a beverage,” etc. The appellant filed his verified plea in abatement, a demurrer to which was sustained.

The appellant denied the jurisdiction of the court over him, for the following reasons: (1) The information was filed upon an affidavit made by Oscar W. Powell, purporting to have been sworn to before Walter L. Carey as notary public. Carey, on May 27, 1901, was duly appointed and commissioned by the Governor of the State of Indiana, as a notary public, and then as such duly took the oath of office, qualified, gave bond and entered upon the duties of the office, which appointment was the only appointment, power or authority he had from and after that date to act as notary public in this State. After he had so received said commission, and had so qualified and taken upon himself the duties of a notary public, but long before the making of such affidavit, Fred E. Hines, the duly

elected, qualified and acting prosecuting attorney for Hamilton county, Indiana, duly and legally appointed Carey as deputy prosecuting attorney within and for that county, he to receive as compensation for his services as such deputy one-half of the fees allowed by law to be taxed, which should be collected, in each case prosecuted by him as such deputy. Carey then duly accepted such appointment, entered upon his duties as deputy, prosecuted a number of the pleas of the State, and collected and received one-half of the fees allowed by law to be taxed in such cases for the prosecuting attorney, all of which prosecutions he conducted as deputy prosecuting attorney by virtue of said appointment by Hines, and said fees were taxed and collected by him by virtue of his appointment as deputy as aforesaid, until a short time prior to the making of said affidavit, when he was discharged from such office by the prosecuting attorney, Hines; and at the time of the making of the affidavit Carey did not hold such office of deputy prosecuting attorney. At no time after he so accepted the office of deputy prosecuting attorney did Carey take or receive any commission or authority to act as notary public within this State, or qualify as such, nor at the time he attempted to swear Powell to the affidavit was Carey a notary public, nor did he then have any power or authority to administer such oath to Powell.

(2) It was further averred that Carey had no authority, power or capacity to administer the oath to Powell, because at and before the time of the making of the affidavit Carey had been employed by some association, person or persons, unknown to the affiant, but not the State of Indiana or any of its officers, to procure evidence to sustain this prosecution, and on behalf of said association or persons to act as attorney in the prosecution of this cause for an agreed compensation, and was so acting as such attorney at the time he administered the oath to Powell, who had been and then was employed by said unknown persons or association to

procure evidence upon which to base this prosecution, for which he was to be paid an agreed compensation, all of which Carey at the time well knew; that by reason of the facts aforesaid Carey, at the time he administered the oath to Powell, had an interest in the commencement of this action and the prosecution thereof, and an interest in the prosecution, by reason whereof he was not disinterested, and had not capacity as notary public to administer such oath.

Assuming that the office of deputy prosecuting attorney is a lucrative office, by the acceptance of which the appointment of Carey as a notary was vacated, under §8041

1. Burns 1901, Acts 1891, p. 335, yet he had been duly appointed as a notary public, was duly qualified as such, and had entered upon the duties of the office, and the act of administering the oath was an official act which a notary public *de jure* might properly perform; and while at the time of administering the oath to the prosecuting witness Carey had no lawful authority to act as a notary public, yet his administering the oath was the act of an officer *de facto*, and could not be questioned collaterally, as the appellant sought to do by his plea. In administering and in certifying the oath, Carey was performing an act pertaining to the office of notary public under color of office by virtue of his appointment and qualification as a notary public. Though his right to do so was subject to be questioned, he was not a mere usurper without any color of authority. His official act could not be questioned collaterally because of his having no legal right to continue to act as such officer, as it might if he were not such an officer either *de facto* or *de jure*. *Blackman v. State* (1859), 12 Ind. 556; *Creighton v. Piper* (1860), 14 Ind. 182; *Bansemmer v. Mace* (1862), 18 Ind. 27, 81 Am. Dec. 344; *Gumberts v. Adams Express Co.* (1867), 28 Ind. 181; *Case v. State, ex rel.* (1879), 69 Ind. 46; *Leech v. State, ex rel.* (1881), 78 Ind. 570; *Mowbray v. State, ex rel.* (1882), 88 Ind. 324; *Baker v. Wambaugh* (1885), 99 Ind. 312;

Parker v. State, ex rel. (1892), 133 Ind. 178, 200, 18 L. R. A. 567; *Davidson v. State* (1893), 135 Ind. 254, 259.

Ignoring the conclusions of law stated in the portion of the plea designated therein as the second paragraph, it does not appear therefrom that the notary public who ad-

2. ministered the oath in question was interested as a party or could recover any judgment or be subjected to any judgment therein, or could become liable for any of the costs accruing therein. It merely appears that the person who as notary public administered the oath was employed for an agreed compensation, by persons unknown, to procure evidence on which to base the prosecution and to act as an attorney in the prosecution of the cause. The affidavit was the basis of the information, and, if it would affect the question, it does not appear that he was employed to procure false evidence or a false affidavit. Such matter did not constitute a valid reason why the accused should not be held to answer to the charge of misdemeanor. The administration of the oath was within the statutory authority of the notary public, and we know of no statute forbidding such an officer to act as such under the circumstances as alleged.

In *Yeagley v. Webb* (1882), 86 Ind. 424, it is said: "We know of no law in force in this State which forbids an attorney, who is also a notary public, from administering an oath to his client. The propriety of such an act may possibly be questioned, but the act is not illegal. The oath thus administered is a legal oath, and, if untrue, the affiant, might, doubtless, be convicted of perjury therefor." See, also, *Creighton v. Piper* (1860), 14 Ind. 182, 184.

Some objections are urged to the action of the court in refusing an instruction and in giving instructions, but

none of these instructions are set out, nor is the

3. substance of any of them stated in the appellant's brief.

The evidence was such that this court can not interfere with the result reached thereon in the trial court.

Judgment affirmed.

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EHLERS v. HARTMAN ET AL.

[No. 5,874. Filed April 25, 1906.]

APPEAL AND ERROR.—Parties.—Death.—Failure to Make Representative a Party on Appeal.—Dismissal.—Where judgment was taken September 14, 1904, and one of the appellees, a party defendant, died December 8, 1904, an appeal taken September 12, 1905, without making such decedent's representative a party will be dismissed.

From Ripley Circuit Court; *Willard New*, Judge.

Action by John H. Ehlers against August Hartman, Sr., and others. From a judgment for defendants, plaintiff appeals. *Appeal dismissed.*

Nicholas Cornet and *John B. Rebuck*, for appellant.

Frank S. Jones and *R. A. Creigmile*, for appellees.

PER CURIAM.—Appellees move to dismiss this appeal for several reasons. We need consider only the first, to wit: August Hartman, Sr., one of the appellees, and who was a defendant in the court below, died December 8, 1904, after judgment was rendered September 14, 1904, and before the transcript was filed in this court September 12, 1905.

This court has no jurisdiction. *Ewbank's Manual*, §§145, 229; *Hewitt v. Mills* (1901), 27 Ind. App. 218; *Doble v. Brown* (1898), 20 Ind. App. 12.

Appeal dismissed.

**CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. PATTERSON.**

[No. 5,452. Filed October 31, 1905. Rehearing denied February 16, 1906. Transfer denied April 27, 1906.]

1. **MASTER AND SERVANT.—Works, Ways and Machinery.—Repairs.**—It is the master's duty to use reasonable care to provide servants safe tools and appliances with which to work. p. 621.

2. **PLEADING.**—*Complaint.*—*Railroads.*—*Defective Engines.*—A complaint by the servant showing that defendant railroad company ordered him, over his protest, to run an engine the windows of which had been boarded up, thus compelling him, in order to receive signals and see his train, to hold his head near the water-gauge, which was defective and liable to burst, of which defect defendant had knowledge and plaintiff had not, states a cause of action. p. 621.
3. **MASTER AND SERVANT.**—*Works, Ways and Machinery.*—*Defects Causing Exposure of Servant to Other Dangers.*—A railroad company furnishing its engineer an engine with windows boarded up so that such engineer was compelled to hold his head near a dangerous water-gauge in order to see the train and the signals is liable for injuries caused by such gauge, such defective boarding being a proximate cause of the injury, the fact that other causes contributed thereto being no defense. p. 621.
4. **NEW TRIAL.**—*Railroads.*—*Negligence.*—*Evidence.*—*Conjectures.*—A new trial can not be granted because of insufficient evidence, where the plaintiff engineer was injured by an explosion of a water-gauge, near which he was holding his head to see his train and brakemen's signals because the windows of his cab had been boarded, the defendant's contention that he might have been hurt though such windows were in good condition being purely conjectural. p. 622.
5. **RAILROADS.**—*Engineers.*—*Whether Duty to Receive Signals from Firemen Exclusive.*—It is the duty of a railroad engineer to keep a vigilant outlook, and he is not compelled to rely exclusively upon signals from his fireman in the operation of his engine. p. 622.
6. **NEGLIGENCE.**—*Proximate Cause.*—*Question for Jury.*—Whether an injury was proximately caused by the alleged negligence is primarily a question of fact for the jury. p. 623.
7. **SAME.**—*Proximate Cause.*—*Intervening Agent.*—*When a Defense.*—Defendant can escape liability for his negligence on the ground of an intervening agent only when he could not reasonably anticipate the presence of such agent. *New York, etc., R. Co. v. Perriguy*, 138 Ind. 414, and *McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, distinguished. p. 623.
8. **TRIAL.**—*Negligence.*—*General Verdict.*—*Effect.*—A general verdict for plaintiff in a negligence case is a finding that the negligence complained of was the proximate cause of the injuries. p. 624.
9. **MASTER AND SERVANT.**—*Assumption of Risk.*—*Basis of.*—*Contracts.*—The doctrine of assumed risk in relation to known de-

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fects depends upon an implied contract deduced from the facts, but where there is an express one, such implied contract is necessarily excluded. p. 624.

10. MASTER AND SERVANT.—*Assumption of Risk*.—Where an engineer is assured by the railroad company that his engine, against the running of which he has protested, is all right and that the company is responsible for what happens, such engineer does not assume the risks of the defects against which he has protested, and the company becomes responsible therefor. p. 624.
11. CONTRACTS. — *Master and Servant*. — *Negligence*. — *Works, Ways and Machinery*.—Contracts by which the master becomes responsible for injuries to servants caused by defects in the works, ways and machinery are valid. p. 625.
12. MASTER AND SERVANT.—*Works, Ways and Machinery*.—*Negligence*.—*Contributory*.—The servant who works with tools known to be defective can not, as a matter of law, be held guilty of contributory negligence. p. 626.

From Decatur Circuit Court; *Francis T. Hord*, Judge.

Action by Samuel N. Patterson against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment on a verdict for plaintiff for \$6,000, defendant appeals. *Affirmed*.

L. J. Hackney, John T. Dye and Frank L. Littleton, for appellant.

George W. Bruce, for appellee.

ROBY, J.—Appellee had judgment in an action for personal injuries. The cause was tried upon a single paragraph of complaint.

Errors assigned are that the court erred in overruling appellant's demurrer to the complaint and in overruling its motion for a new trial.

It is averred in the complaint that appellant was operating a railroad, and appellee was in its employ on February 3, 1903, in the capacity of an extra engineer, and on said day it ordered him to take its engine No. 723, and pull a freight-train from Cincinnati to Indianapolis; that said engine had been negligently permitted to become and be out of repair and unfit for use, and that the glass had been

broken, or taken out of the cab windows, and said windows covered and closed with boards, so that they could not be used; that as originally constructed said cab had glass windows on the side and front for the use of engineer and fireman, and they were made to open, so that the engineer could look back, see his train, and receive signals relative to its management from the conductor and brakemen; that by reason of the windows' being boarded up, it became necessary for appellee, in order to receive the signals given, to turn from his seat toward the center of the cab, thereby bringing his face in proximity to the water-gauge and valve thereon; that the water-gauge was partly composed of glass, in the form of a tube twelve inches long; that there were valves and cocks in the cab which appellant had negligently suffered to be and remain out of repair, and they were leaking and making a noise, rendering it difficult for appellee to hear; that said water-gauge was liable to explode at any time and to injure appellee, of which appellant had knowledge and appellee none. It is also averred that appellee was in the line of promotion in said service, and that he was induced to take out and operate said engine by appellant's roundhouse foreman, who had charge of and full power in its behalf over its engineers at the Cincinnati terminus, and to whose orders he was bound to conform; that said foreman assured him that the engine was perfectly safe for use, and threatened to discharge him if he did not take the same out; that while operating said engine, and in endeavoring to get signals from the brakeman for the placing of the engine in such position that the locomotive and tank might be uncoupled, said water-gauge exploded, the steam and broken glass striking appellee in the face, destroying one eye, damaging the other, and inflicting additional injury; "that said injuries were caused by defendant's negligence as herein set forth and alleged."

It is the unquestioned duty of the master to use reasonable care in furnishing safe tools and appliances for the

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servant's use. This duty is shown by the allegations

1. of the pleading in question to have been disregarded by appellant. No suggestion is made to the effect that the engine was in a reasonably safe and fit condition for use, but, in support of the assignment based
2. upon the overruling of the demurrer, it is argued that the negligent boarding up of the windows was not the proximate cause of the injury, but that said proximate cause was the bursting of the water-gauge, not averred to have been caused by appellant's negligence.

It is averred that appellant did not exercise reasonable care in furnishing a safe engine, and because of its negligence in that behalf its employe was injured. A number of particulars are specified in regard to which the defects are explicitly pointed out, one of which was the liability of the water-gauge to explode and injure appellee, of which fact he is averred to have been ignorant and appellant to have had knowledge. The general denial, put in issue, among other things, whether the engine was defective as averred, and whether such defects caused the injury complained of, and each issue was one of fact. *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App. 308. The averment that the injury was caused by the defective tool is sufficient, it not being overcome by specific facts exhibited. If it were true, as assumed, that no charge of negligence with

3. regard to the water-gauge is made, it would by no means follow that appellant would be relieved from liability. If its conduct in furnishing an engine which was defective, as alleged, caused appellee to be in a place of danger, thereby leading to his injury, such negligence is a proximate cause thereof, and the fact that other causes contributed thereto affords no defense. *Cincinnati, etc., R. Co. v. Worthington* (1903), 30 Ind. App. 663, 96 Am. St. 355; *Lake Shore, etc., R. Co. v. McIntosh* (1895), 140 Ind. 261; *Board, etc., v. Mutchler* (1894), 137 Ind. 141.

It is averred at length that, had the windows of the cab

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been in condition to use, appellee would, in the work he was doing when injured, have been taken away from the danger, while because of their defective condition he was compelled to occupy a portion of the cab whereby he was exposed thereto, and his injury thereby caused. The demurrer admits these allegations to be true, and there was therefore no error in overruling it. *Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 54 L. R. A. 787.

In support of the ground stated for a new trial, that the evidence is insufficient to sustain the verdict, it is argued

that whether appellee would, had the windows been

4. in proper condition, have been turned away from the point of danger at the instant of the explosion, is purely conjectural. This contention may readily be granted, but there was evidence from which the jury might find, as the general verdict does, that he was in the place of danger, while receiving signals and obtaining information relative to the movement of the engine, and that his presence there was caused by the cab windows' being boarded up. Conjectures as to what he might have been doing in contingencies which did not exist do not affect the finding of fact as to what he was doing and the conditions leading to the action taken. There was evidence tending to sustain appellee's theory relative to the cause of the injury complained of. Appellant requested a number of instructions embodying its theory upon this subject. They were not given, and, in view of what has been said, will not be adverted to.

It may be that the fireman was charged with the duty of receiving signals and communicating them to his engineer, as asserted, but such duty can not be regarded as

5. exclusive. The obligation which rests upon the engineer in the performance of his responsible task calls for constant vigilance upon his part, and we decline to hold that keeping a vigilant outlook was not within the line of his duty.

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A considerable number of cases, in which questions of proximate cause have been considered, are cited in appellant's brief. The facts considered in them differ

6. from those presented in this case. Whether an injury is caused by the acts of omissions of the defendant, which are attacked as negligent, is primarily a question of fact to be determined by sensible men, in the light of circumstances and conditions existing. *Chicago, etc., R. Co. v. Martin, supra*; *Southern R. Co. v. Webb*, (1902), 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; *Great Northern R. Co. v. Bruyere* (1902), 114 Fed. 540, 51 C. C. A. 574; *Patten v. Chicago, etc., R. Co.* (1873), 32 Wis. 524, 535; *Landgraf v. Kuh* (1901), 188 Ill. 484, 501, 59 N. E. 501; *Felton v. Harbeson* (1900), 104 Fed. 737, 44 C. C. A. 188; *Chicago, etc., R. Co. v. Price* (1899), 97 Fed. 423, 38 C. C. A. 239.

In *New York, etc., R. Co. v. Perriguet* (1894), 138 Ind. 414, and *McGahan v. Indianapolis Nat. Gas Co.* (1895).

140 Ind. 335, 29 L. R. A. 355, 49 Am. St. 199,

7. verdicts were set aside upon the ground of a responsible intervening agent, but the court, notwithstanding the evident care with which the opinions were prepared, overlooked the fact that, where the intervening agency is one whose intervention might reasonably have been foreseen by the wrongdoer, it does not operate to relieve him from liability. *Terre Haute, etc., R. Co. v. Buck* (1884), 96 Ind. 346, 49 Am. Rep. 168; *Louisville, etc., R. Co. v. Lucas* (1889), 119 Ind. 583, 590, 6 L. R. A. 193; *City of Crawfordsville v. Smith* (1881), 79 Ind. 308, 41 Am. Rep. 612; *Billman v. Indianapolis, etc., R. Co.* (1881), 76 Ind. 166, 40 Am. Rep. 230; *Binford v. Johnston* (1882), 82 Ind. 426, 42 Am. Rep. 508; *Cincinnati, etc., R. Co. v. Eaton* (1884), 94 Ind. 474, 479, 48 Am. Rep. 179; *Alexander v. Town of New Castle* (1888), 115 Ind. 51; *Clore v. McIntire* (1889), 120 Ind. 262, 265; *Milwaukee, etc., R. Co. v. Kellogg* (1876), 94 U. S. 469, 24 L. Ed. 256;

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Mahogany v. Ward (1889), 16 R. I. 479, 17 Atl. 860, 27 Am. St. 753; *Southern R. Co. v. Webb, supra*; 1 Thompson, Negligence (2d ed.), §54.

The general verdict carries a finding that the
 8. negligence complained of was the proximate cause of the injury suffered, and there is no good reason for setting it aside.

The doctrine that the servant who remains in employment after knowledge of the danger thereby assumes the risk depends upon an implied contract deduced

9. from such facts. *Davis Coal Co. v. Pollard* (1902), 158 Ind. 607, 92 Am. St. 319. Where there is an expressed contract there can be no implied one. *Long v. Straus* (1886), 107 Ind. 94, 99, 57 Am. Rep. 87; 15 Am. and Eng. Ency. Law (2d ed.), 1078. The appellee

10. testified: That on February 3, 1902, he was in the employ of the appellant, as an extra engineer, taking regular engineers' places when they were absent; that he was subject to call in case there was a vacancy; that he was working in Wood street yards; that for some four or five months prior he had been running extra switch-engines at said Wood street and Mill creek yards, Cincinnati, Ohio; that on said day he was ordered by appellant's superintendent to report to the Riverside roundhouse for through freight service; that in obedience to said order he reported to James Keegan, the foreman at the Riverside roundhouse; that about 3:30 o'clock he was called by direction of said foreman for an "extra west;" that in obedience to said call he went to the roundhouse and saw that he was marked for engine No. 723 west, to leave at 4 o'clock; that he then went out to said engine, and walked around her, and met the foreman, Keegan, and said: "Mr. Keegan, I don't want to run that engine the way she is; she is boarded up, and I can't see the right of way." And Keegan said: "That engine is all right; we don't want to have any bulling out of you around here; we want you to get out of here; this

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engine is all right and safe for service." To which remark the appellee replied: "If I get on this engine, you will be responsible for anything that happens along the road." And Keegan replied: "We are responsible for all things; that engine is O. K.; you get on her and go. * * * You get on her and go, or you will never run any more engines for this company." Appellee then took charge of said engine. The witness Charles Sands testified that there was some kind of an argument: "Nick [the appellee] did not want to go out on the engine the condition she was in, and Mr. Keegan told him to go on, and go out on it, or he would not make any more trips on any other engine on that road, and Nick said he didn't like to take the engine out in that kind of shape, and Mr. Keegan told him to take the engine and go out; that she was all right to go out; that she was all right to go, and if he did not take that engine or locomotive out that he would not take any other out for the company, and that it was all right and ready to go."

There is no reason why the master may not contract to assume all risk arising from defective appliances furnished by him. "It may be collected from the

11. almost unanimous current of judicial authority that, if the servant complains of or directs attention to a defect or danger in the place where he is required to work, or in the tools, machinery, or appliances with which he is required to work, and thereupon the master, or his representative, assures him that he can proceed without danger, and requests or commands him to continue his work—the servant will not, as a matter of law, be put in the position of having accepted the risk, or of having been guilty of contributory negligence, because of relying upon the presumed superior knowledge of his master or of his master's representative, and continuing the work. The servant will not be imputable with wrong for thus acting upon the advice or assurance of the master or his vice-principal, nor will it lie in the mouth of the master to impute blame to

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the servant for so doing.” 4 Thompson, Negligence (2d ed.), §4664. The conclusion stated accords with our own cases. *Phillips v. Michaels* (1895), 11 Ind. App. 672; *Bradbury v. Goodwin* (1886), 108 Ind. 286.

It does not follow that one who works with a defective appliance or machine is necessarily guilty of contributory negligence because of so doing. *American Car, etc., Co. v. Clark* (1904), 32 Ind. App. 644.

Appellee does not appear to have been, at the time of his injury, doing anything unusual or unnecessary to the operation of the engine in its then condition.

Judgment affirmed.

TOWN OF ROYAL CENTER v. BINGAMAN.

[No. 5,503. Filed April 27, 1906.]

1. PLEADING. — *Complaint.—Municipal Corporations.—Streets.—Obstructions.*—A complaint against a town for personal injuries which alleges that an obstruction on one of the town streets frightened plaintiff's horse, thereby causing injuries, will be construed as showing that some third party placed such obstruction on such street. p. 628.
2. SAME. — *Complaint.—Municipal Corporations.—Streets.—Obstructions.—Necessity for.*—A complaint against a town for personal injuries caused by an obstruction of a street does not need to allege that there was no necessity for such obstruction. p. 629.
3. SAME. — *Complaint.—Municipal Corporations.—Streets.—Obstructions.—Notice.*—A complaint against a town for personal injuries caused by the obstruction of a street by a third party must show that the town had notice thereof. p. 629.
4. SAME. — *Complaint.—Municipal Corporations.—Streets.—Obstructions.—Negligence.—How Averred.*—A complaint against a town for personal injuries, which merely shows an obstruction of the street, notice thereof to the town and injuries caused thereby, is insufficient where it fails to show that the obstruction was negligently permitted to be or remain there. p. 629.
5. SAME. — *Complaint.—Municipal Corporations.—Streets.—Obstructions.—Frightening Horses.—Contributory Negligence.*—A

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complaint against a town for personal injuries caused by the frightening of plaintiff's horse at an obstruction in the street must show that such obstruction was such as to frighten an ordinarily gentle horse, and such averment is not for the purpose of negating contributory negligence. p. 630.

6. PLEADING. — *Complaint.*—*Municipal Corporations.*—*Streets.*—*Obstructions.*—A complaint against a town for personal injuries caused by an obstruction of its street is not necessarily insufficient because it does not in terms show that such obstruction was within the corporate limits, especially where it is evident from the whole complaint that it was within such limits. p. 635.

From Cass Circuit Court; *John S. Lairy*, Judge.

Action by Mabel F. Bingaman against the Town of Royal Center. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. *Reversed.*

George W. Funk and *Kistler & Kistler*, for appellant.

Nelson, Myers & Yarlott and *McConnell, Jenkines, Jenkines & Stuart*, for appellee.

BLACK, P. J.—The appellee, a minor, suing by her next friend, alleged in her amended complaint that the defendant, the appellant, is a municipal corporation in Cass county, organized and existing under the general laws of this State for the incorporation of towns; “that among other streets named in said town is a street named and known as North street, which street was and is one of the public and much-used streets of the defendant, and then was, for many months had been, and still is, a public highway under the exclusive dominion and control of the defendant; that upon, to wit, November 18, 1901, in the evening after dark, plaintiff was riding in a vehicle drawn by a horse hitched thereto, which she was then and there driving with due care on and along said street, said horse being a well-trained, gentle horse, which she had many times prior to that date driven in and about the town of Royal Center with safety; that upon, to wit, said November 18, 1901, there was, and had been for more than thirty days, at a point on said street, opposite to an electric light

building, upon a lot in said town abutting said street, piles of brick, sand, gravel, dirt, lumber, lime, boxes, barrels and rubbish, that were then and there piled in said street to a height of from four to six feet, and extending more than half way across said street, filling up more than half thereof, and that were then and there calculated to frighten horses driven on and along said street, and that did then and there greatly frighten and alarm her said horse, so that it became, by reason of said obstruction in said street, unmanageable from fright and alarm, and then and there ran away and threw her out of her said buggy against a tree and to the ground, with such terrific force and violence that she was thereby made sick and sore and was thereby greatly bruised," etc., describing her injuries, and stating her damages. It was further alleged, that prior to the day of said injury, "she had no knowledge or notice that said street was thus obstructed and said things piled therein, and had no knowledge or notice that there was anything in said street calculated to frighten an ordinarily gentle horse; that the defendant had full and ample notice of the condition of said street as aforesaid, in ample time to cause said obstructions to be removed, and said street cleaned and cleared of said obstructions and made safe for travel before her said injury; that no lights or other safeguards or other warnings of any kind were put or maintained upon or around said obstructions to inform or warn this plaintiff and the public generally thereof," etc.

The complaint alleges the presence of the obstruction upon the street, without stating by whom the materials of

which it was composed were placed there, or for

1. what purpose they were so placed, or to what use they were to be or had been applied. It is not shown that the things constituting the obstruction were placed in the street by the municipal corporation or for its use or by its permission or authority, or in the prosecution of any undertaking authorized by that corporation or contemplated

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by any contract to which the town was a party. Therefore, the pleading must be construed against the pleader as a complaint seeking recovery for damage caused by an obstruction of the street not made or authorized by the town but created by the act of a third person. Such a complaint, if otherwise sufficient, would not be rendered

2. insufficient by the absence of an averment showing that there was no reasonable necessity for so incumbering the street; for the existence of such necessity would constitute matter to be set up by way of defense. *Wood v. Mears* (1859), 12 Ind. 515, 74 Am. Dec. 222; *Senhenn v. City of Evansville* (1895), 140 Ind. 675.

In such a case it must be shown that the municipal corporation had reasonably sufficient notice of the dangerous condition of the street. In this complaint it is

3. alleged that no lights or other safeguards or other warning were put or maintained upon or around the obstructions to inform and warn the appellee and the public generally thereof, but it is not alleged that the appellant had any notice of such failure to provide warning, nor is it directly shown that the appellee's injury was caused thereby or that such failure contributed to the injury; nor is any fault directly ascribed to the appellant because of such absence of means of information and warning.

The complaint, however, sufficiently shows notice to the appellant of the presence in the street of the obstruction which frightened the horse and by reason of which the horse became unmanageable, ran away, and threw appellee out of her buggy.

It was necessary to the sufficiency of the complaint tested by demurrer that, by direct averments of facts, it should show a wrong of the appellant constituting the proximate cause of the injury alleged.

4. No act or omission of the appellant was alleged; the presence of an obstruction, described, in the street was stated and notice to the appellant of its presence was averred; but it was no-

where charged that anything was negligently done, or omitted, or permitted, or suffered by the corporation. It is not necessary to show negligence by the use of that word in pleading, if what is alleged may be said as a matter of law to constitute negligence; but in such a case as this it is necessary that the complaint show by its allegations a wrong as a proximate cause. The things constituting the obstruction might have been in the situation occupied by them without wrong on the part of the appellant, though it had notice of their presence. They might have been placed and allowed to remain there temporarily in the course of the erection or repair of a building upon the adjoining lot. Unless their presence there at the time of the injury constituted a wrong on the part of the town it would not be liable for the injury. The pleading, without anticipating any defense, should have alleged all that was necessary to constitute an actionable wrong. It was not necessary, as above remarked, to aver in anticipation that there was no reasonable necessity for their presence, or to have shown that they were not placed there in the proper or allowable use of the street by an adjoining proprietor; but the town could be held responsible only on the ground of negligence in suffering the materials to be and remain in their alleged situation; and to put the corporation to its defense its negligence should have been alleged, thereby to place the appellant positively in the wrong by the allegation of all the necessary ingredients of a wrong.

It is generally agreed in the decisions that a municipal corporation is liable in such a case only when the object suffered to remain in the street is such as is calculated

5. to frighten an ordinarily gentle or roadworthy horse.

If the injury occurs in fact because of the vice of the animal, the object at which it takes fright, for the presence of which it is sought to hold the corporation responsible, can not be said properly to be the proximate cause, and the injury cannot be charged to the wrong of the corpora-

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tion. For the purpose of showing a *prima facie* cause the complaint must affirmatively show the defendant responsible for the proximate cause, must show that the object at which the animal took fright was such a thing that wrong may be said to be attributable, as a matter of law, to the corporation because of its presence in the street at the time of the injury.

In the complaint before us it is alleged that the horse which took fright was a well-trained and gentle horse, and that the object at which it took fright was calculated to frighten horses driven on and along the street, that the appellee had no knowledge or notice that there was anything in the street calculated to frighten an ordinarily gentle horse; but it is not alleged that the obstruction in question was calculated to frighten ordinarily gentle horses. It is well known that horses, whether vicious or gentle, sometimes take fright at objects upon or adjoining the roadway for whose presence there no blame can be attributed to anyone. Instances will readily occur to the mind. If the cause of the fright and the consequent injury is in truth the inherent faultiness of the horse, there can be no recovery. If, though the horse be ordinarily roadworthy, it take fright at an object which could not be regarded by a person of ordinary skill and prudence as calculated to frighten an ordinarily roadworthy horse, there would be no responsibility on the part of the municipal corporation. It is not enough; then, that the horse which becomes frightened be an ordinarily gentle horse, but the object by which it is frightened must be one calculated to frighten an ordinarily gentle horse. An averment that the object was one adapted to frighten an ordinarily gentle or roadworthy horse can not properly, we think, be said to be one made for the purpose of showing the absence of contributory negligence on the part of the driver of the animal, but it is proper for the purpose of showing the negligence of the defendant by characterizing the object as one for the consequence of

whose unauthorized presence the defendant is responsible.

In *Cleveland v. City of Bangor* (1895), 87 Me. 259, 32 Atl. 892, 47 Am. St. 326, it is said: "Whether the fright of the horse at the electric car shall be deemed the true and real cause of the accident, or only a circumstance which permitted it to happen, must depend upon the character of the horse and the extent of his misconduct. If the horse was not reasonably gentle and safe and became entirely unmanageable from fright, substantially freeing himself from the control of the driver, and the accident resulted from such a want of control, then the fright of the horse might be regarded as one of the proximate causes of the accident. If, however, the horse was ordinarily safe and reasonably suitable for use on the public street, and, while being properly driven, started and shied at the sudden appearance of the electric car around the curve, swerving but a few feet from the line of travel, and through only a momentary loss of control by the driver brought the carriage in contact with the pole in the street, in such case the conduct of the horse could not in reason and justice be considered as causing the accident."

In *Mallory v. Griffey* (1877), 85 Pa. St. 275, it was said: "It was claimed that the stone was an object calculated to frighten an ordinarily quiet and well-trained horse, and that the defendant was chargeable with negligence in leaving it on the highway. This presented a question of fact, which was properly submitted to the jury, with the instruction that the plaintiffs could not recover, unless they found 'from the evidence that a stone or rock, such as was placed in or near the road by the defendant, was, in and of itself, an object calculated to frighten an ordinarily quiet and well-broken horse.' If this had been the only question of fact to be found by the jury, the verdict would have been conclusive of the plaintiffs' right to recover; but the question of contributory negligence, raised by the defendant's fourth point, was also submitted. Both of these questions

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may have been found in favor of the defendant, but we have no means of determining whether they were or not. The verdict, for aught we know, may have been based upon the finding of contributory negligence alone; and if so, the plaintiffs were prejudiced by the affirmance of the defendant's ninth point, viz.: 'That if the plaintiffs have not shown affirmatively that their own negligence did not contribute, in any degree, to the injury, they can not recover.' This instruction cast upon the plaintiffs the onus of disproving negligence and was clearly wrong. Negligence of a plaintiff, contributing to the injury complained of, is matter of defense, and, ordinarily, the burthen of proving it is on the defendant."

In *Piollet v. Simmers* (1884), 106 Pa. St. 95, 51 Am. Rep. 496, the correct rule was said to be, that a property owner who has a lawful right to expose an object on or along a public highway, within view of passing horses, for a temporary purpose, is bound only to take care that it shall not be calculated to frighten ordinarily gentle and well-trained horses; and that this seems to be the tenor of the authorities in the cases in which there has been a judicial expression on the subject. After a reference to a number of authorities it was said: "It seems to us it would be difficult to state a rational rule on this subject unless it is accompanied with this limitation."

In *Elliott, Roads and Sts.* (2d ed.), §616, it is said, that whether the object is in its nature calculated to frighten horses of ordinary gentleness is usually a question for the jury to determine from a consideration of its character, situation, the amount of travel on the highway, and other like circumstances; and in a note to that section it is said, that *Cleveland, etc., R. Co. v. Wynant* (1887), 114 Ind. 525, 5 Am. St. 644, can not be taken as expressive of a universal rule, and ought not to be regarded as going further than that there are some objects which may be declared, as matter of law, not likely to frighten well-broken horses.

In *Town of Rushville v. Adams* (1886), 107 Ind. 475, 478, 57 Am. Rep. 124, it is said: "In order to render the corporation liable in such cases, it must, in some way, be made to appear that the object or obstruction was one naturally calculated to frighten horses of ordinary gentleness, and that the horse frightened was of such character."

There being in that case an objection urged to the complaint, that these facts were not sufficiently made to appear by its averments, it was said by the court that the complaint was not as definite and specific as the rules of good pleading would require, and that if the question were upon the overruling of a motion to have it made more certain and specific, the court would feel constrained to reverse the judgment; and the case was treated as one in which the averments of the complaint "in regard to negligence" were not sufficiently clear and specific, an objection to be reached by motion. The court thought that the general averment in the complaint before the court, that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting the person to maintain and carry on the business of making candy on the street, made the complaint good against demurrer. While there may be found in our reports precedents which would seem to favor the view that such an averment concerning the object which caused the fright of the animal may be dispensed with, the distinct question not appearing to have been presented to the court, and expressions of like tendency made when the sufficiency of a complaint was not in question, yet the principles involved in such actions, as recognized and expressed here and in other jurisdictions generally, considered with our system of pleading, which makes it obligatory upon the plaintiff to state directly the facts constituting his cause of action, would seem to indicate at least that a complaint which neither contains such an averment nor charges negligence of the defendant can not be held sufficient on demurrer.

It has been urged against the complaint that it does not show that the place of the obstruction was within the corporate limits of the town; and it must be admitted

6. that there is not wholly lacking ground for such a criticism. We would not be strongly disposed, if the complaint were otherwise sufficient, to reverse a judgment for such an inadvertent failure distinctly to express what was so apparently intended throughout the pleading; and the want of exact accuracy may be remedied readily by amendment.

Judgment reversed, with instruction to sustain the demurrer to the amended complaint.

GRAU v. GRAU.

[No. 5,539. Filed April 27, 1906.]

1. **PLEADING.—Complaint.—Contracts.—Breach.—Motion to Make Specific.**—A motion to make more specific, in an action for breach of contract and for specific performance, should be overruled to a complaint alleging that defendant paid all the debts which he owed by the profits of his farm which plaintiff had cultivated for three years in consideration that defendant, upon the payment of all of his debts, would deed to plaintiff twenty acres of land, there being no claim that plaintiff paid such debts. p. 637.
2. **JUDGMENT.—Complaint.—Paragraphs.—Specific Performance.—Damages.**—Where a complaint consisted of two paragraphs, the first for specific performance and the second for damages, and there was a money judgment only, it affirmatively appears that the judgment rests on the second paragraph. p. 638.
3. **PLEADING.—Complaint.—Contracts.—Breach.—Damages.—Due and Unpaid.**—It is not necessary that a complaint for damages for a breach of contract should in terms allege that the claim is due and unpaid, where it appears from the entire complaint that it is due and unpaid. p. 638.
4. **SAME.—Complaint.—Contracts.—Breach.—Nominal Damages.**—A complaint which shows a breach of contract by defendant entitles plaintiff at least to nominal damages and is therefore sufficient as against a demurrer. p. 638.

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5. **APPEAL AND ERROR.**—*New Trial.*—*Evidence Not in Record.*—Where the evidence is not brought into the record, questions raised by the motion for a new trial cannot be considered. p. 639.

From Whitley Circuit Court; *Joseph W. Adair*, Judge.

Suit by Charles Grau against George Grau. From a decree for plaintiff, defendant appeals. *Affirmed.*

Benton E. Gates and *D. V. Whiteleather*, for appellant.
Andrew A. Adams, for appellee.

ROBINSON, J.—Appellee's complaint is in two paragraphs. The first asks the specific performance of a contract to convey land, and the second, damages. Answer, denial, and, to the second paragraph, payment. Trial, finding for appellee for \$900, and judgment accordingly.

The first paragraph of amended complaint avers that on September 10, 1900, appellant purchased twenty acres of land, described; that he owned eighty acres in addition, and was largely in debt, both on account of such purchase and other accounts; that he was in feeble health and was unable to work or manage the farm, and was in danger of losing his farm or suffering great loss on account of such debts; that at that time appellee, who is the son of appellant, was over the age of twenty-one years and desirous of working on his own account; that to induce appellee to remain on the farm and cultivate it, and thus enable appellant to pay his debts, appellant promised and agreed that if appellee would remain on the farm and manage and cultivate the same without compensation, and turn the proceeds over to appellant, appellant would, after such debts were paid, convey to appellee by warranty deed the twenty acres of land, and would further assist appellee by erecting a house thereon for him; that appellee accepted such offer, and at once took the charge and management of the farm, cultivating the same and turning over the proceeds thereof to appellant; that he put appellee in possession of the twenty acres under

the terms of the agreement; that he made lasting and valuable improvements thereon in the way of clearing, reclaiming and ditching; that more than six months before the bringing of this action appellant, from the proceeds of the farm, had paid and discharged all such debts, the character and amount of which appellee can not give; that thereupon appellee demanded a conveyance of the twenty acres and the erection of the house; that appellee has fully complied with all the terms of the agreement; that he managed and cultivated the farm for about three years without other compensation than such agreement; that he turned over all the proceeds and earnings of the farm to appellant, or permitted him to collect such earnings; that appellant has neglected and refused to execute the deed or erect the house, and has ejected appellee from the land. Appellee asks that the court require the execution of the deed, and for damages.

The second paragraph is substantially the same as the first, averring the relationship of the parties, the purchase of the twenty acres, the agreement between the parties; that appellee performed all the labor in cultivating the farm, took care of the stock, and had general charge and management of the farm; that he received no compensation whatever for his services, relying on the contract and permitting appellant to collect the profits of the farm; that he so continued for about three years, and until appellant had discharged such debts, the amount of which appellee is not advised; that he demanded, before the bringing of this suit, that appellant should convey the land to him and erect the dwelling, which appellant refused to do; that appellee has fully complied with the terms of the agreement, but that appellant has wholly failed therein, to appellee's damage in the sum of \$2,000, for which he asks judgment.

Appellant's motion to make the complaint more specific, showing the debts paid by appellee, the amount of each, and to whom paid, and showing what crops or moneys

1. he turned over to appellant, with dates and amounts, was properly overruled. It sufficiently appears

from the complaint that all the proceeds from the land for about three years were received by appellant, either directly from appellee or in collecting the profits from others. It is not claimed in the pleading that appellee himself paid appellant's debts, but that they were paid by appellant from the proceeds of the land.

As the court did not decree a specific performance, but gave a judgment for damages only, it can be said that it affirmatively appears that the judgment rests on the

2. second paragraph. This paragraph asks damages for the breach of the contract.

A demurrer for want of sufficient facts was overruled. It is not necessary that the complaint should aver in express terms that the claim is due and unpaid. In *Single-*

3. *ton v. O'Brien* (1890), 125 Ind. 151, the court said: "We recognize the rule which requires, in an action to recover damages for breach of contract, that the complaint allege nonpayment and that the claim is due. But this may not be alleged in express terms. If, taking the pleading altogether, it appears therefrom that the claim is due and unpaid, this is sufficient." Citing *Humphrey v. Fair* (1881), 79 Ind. 410; *Aughie v. Landis* (1884), 95 Ind. 419; *Wagoner v. Wilson* (1886), 108 Ind. 210; *Jagua v. Cordesman & Egan Co.* (1886), 106 Ind. 141.

The complaint avers sufficient facts to show a breach of the contract between the parties, by appellant. It is a well-settled rule that where there has been a breach of

4. contract by one of the parties the other is at least entitled to recover nominal damages (*Rosenbaum v. McThomas* [1870], 34 Ind. 331; *Browning v. Simons* [1897], 17 Ind. App. 45; *City of Dunkirk v. Wallace* [1898], 19 Ind. App. 298), and that in an action for a breach of contract, a complaint which states facts entitling the plaintiff to nominal damages is sufficient against a demurrer (*Richter v. Meyers* [1892], 5 Ind. App. 33; *City of Dunkirk v. Wallace, supra*).

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As the evidence has not been brought into the
5. record, no question is presented upon the motion
for a new trial.

Judgment affirmed.

UNGER v. MELLINGER, EXECUTOR.

[No. 5,585. Filed April 27, 1906.]

1. **APPEAL AND ERROR.—Answer.—Initial Attack on Appeal.**—An answer can not be attacked for insufficiency of facts for the first time on appeal. p. 641.
2. **PLEADING.—Answer.—Denial of Part of Complaint.—Avoidance of Part.**—Under the Indiana code (§350 Burns 1901, §347 R. S. 1881) an answer denying part of the allegations of the complaint and avoiding others constitutes but a single ground of defense. p. 641.
3. **SAME.—Answer.—Additional Answer.—Paragraphs.—Demurrers.**—Where defendant answered by a single paragraph in confession and avoidance and later filed an additional answer, also in avoidance, a demurrer to the "second paragraph of answer" presents no question, such answers presenting but a single defense and thus but one paragraph. p. 642.
4. **APPEAL AND ERROR.—Appellate Court Rules.—Briefs.**—All questions not discussed in appellant's brief are waived. p. 643.
5. **SAME.—Assignment of Errors.—Weight of Evidence.—New Trial.**—A motion for a new trial on the ground of insufficient evidence sufficiently presents on appeal the question of the weight of the evidence. p. 643.
6. **HUSBAND AND WIFE.—Descent and Distribution.—Inchoate Interests.**—Husbands and wives have contingent interests in each other's property which vest at death, and which may be taken away only by a valid marriage settlement. p. 644.
7. **SAME.—Antenuptial Contracts.—Consideration.**—An antenuptial contract made in consideration of marriage is valid and enforceable. p. 644.
8. **SAME.—Postnuptial Contracts.—Marriage.—Consideration.**—Marriage furnishes no consideration for a postnuptial contract. p. 644.

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9. **HUSBAND AND WIFE.**—*Conveyances of Inchoate Rights.*—The inchoate interest of the husband or wife in the other's property cannot be conveyed without a conveyance of the property of the other. p. 645.
10. **SAME.**—*Postnuptial Contracts.—Consideration.*—The postnuptial promise to release the wife's property from any claim of marital rights is no legal consideration for a promise by the wife to release her marital rights in the husband's property. p. 645.
11. **SAME.**—*Postnuptial Contracts.—Executory.*—A postnuptial promise by the husband to release his claim of marital rights in his wife's property in consideration that she release her marital rights in his property is executory and may be disregarded by either party. p. 645.

From Clinton Circuit Court; *Joseph Claybaugh*, Judge.

Suit by John Unger against Jacob Mellinger as executor of the last will of Eliza Unger, deceased. From a decree for defendant, plaintiff appeals. *Reversed.*

John C. Rogers and *W. R. Moore*, for appellant.

Brumbaugh & Curtis, for appellee.

MYERS, J.—By petition filed in the court below appellant sought an order against the executor of the estate of his deceased wife, requiring such executor to distribute to him one-third of the net proceeds of her personal estate.

The petition is in one paragraph, and is upon the theory that, as surviving husband, and having renounced the testamentary disposition of the property made by his wife, he is allowed by law one-third of her personal estate. Appellee answered appellant's petition by confession and avoidance. A demurrer to this answer for want of facts was overruled, and issues thereon formed by reply in general denial. These issues were submitted to the court for trial, finding and judgment. Evidence was introduced and argument of counsel heard, and on November 17, 1904, the cause was submitted to the court for final decision, and the same taken under advisement. On December 5, and before any decision of the court was had, appellee asked and

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obtained leave to file an additional answer to appellant's petition, and to introduce additional testimony, to which action of the court appellant excepted. Appellant's additional answer alleges a postnuptial contract in writing by which appellant and appellee's decedent, Eliza Unger, mutually contracted that neither should inherit from the one dying first; that neither would claim any of the property, real or personal, of the other, which either might own at the time of his or her death; that said agreement has been mislaid, lost or destroyed; that diligent search and inquiry has been made and the same can not be found; that he is unable more fully to set it out in his answer. Judgment is demanded. The general denial formed the issue on the answer. Appellee introduced evidence in support of this additional paragraph, and the cause was again submitted for final consideration and decision by the court. On December 13 the court made a general finding for appellee, and rendered judgment that appellant take nothing by his petition, and judgment for costs in favor of the estate represented by appellee.

We will consider the errors assigned in the order presented by the record.

(1) By appellant's first assignment of error he questions the sufficiency of appellee's additional answer for the first time on appeal. Under our code a complaint

1. for want of facts may be so challenged, but such right does not extend to an answer. *City of Evansville v. Martin* (1885), 103 Ind. 206; *Deller v. Hofferberth* (1891), 127 Ind. 414; *Moreland v. Thorn* (1896), 143 Ind. 211; *Austin v. McMains* (1896), 14 Ind. App. 514.

(2) The second error is based on the overruling of the demurrer to the second paragraph of answer. From the briefs filed in this cause there appears to be some

2. controversy as to whether the pleading filed by appellee, designated as an answer to appellant's

petition, is to be treated as an answer in one or two paragraphs. It seems that appellant treated such answer as an answer in two paragraphs. The record entries so designate it, but appellee insists that although the answer confesses and avoids part of the allegations of appellant's petition and denies all others, it is nevertheless a single defense and should be treated as a single paragraph. Our code (§350 Burns 1901, §347 R. S. 1881) provides that where more than one ground of defense is relied on "each shall be distinctly stated in a separate paragraph, and numbered." If the pleading was intended as an answer containing more than one paragraph, it is not in accord with the above provision of the code. The pleading does not contain a general denial to appellant's petition, but the denial is limited to such allegations as are not admitted and sought to be avoided by affirmative facts. It does not admit and deny the same facts so as to constitute a contradiction, and thereby make the pleading bad. *Weser v. Welty* (1897), 18 Ind. App. 664; *Board, etc., v. Woodring* (1895), 12 Ind. App. 173, 177. A recognized rule of pleading permits a single paragraph of answer to confess certain allegations of a complaint, and avoid the same by affirmative facts and deny all others, and such paragraph will be treated as containing but one ground of defense. *Childers v. First Nat. Bank* (1897), 147 Ind. 430; *State, ex rel., v. St. Paul, etc., Turnpike Co.* (1883), 92 Ind. 42; *Colglazier v. Colglazier* (1889), 117 Ind. 460.

Considering the allegations of the petition which are denied and those confessed and attempted to be avoided

by the answer, we must conclude that it was the purpose of the pleader to set forth but a single defense, and the pleading should be construed as a single paragraph. At the time of filing the demurrer, the overruling of which is the basis of this error, there was no answer on file to which such demurrer was applicable, and for that reason the court did not err in overruling it.

(3) The court refused to require appellee to make the second paragraph of answer more specific, and on this ruling error is assigned. This assignment is not

4. argued, and will be considered as waived. In any event, the conclusion reached on the second error herein is decisive of this question against appellant.

(4) Appellant's fourth error asks this court to weigh the evidence. The question sought to be presented by this error is presented by his motion for a new trial.

5. *Parkison v. Thompson* (1905), 164 Ind. 609.

(5) Appellant's motion for a new trial was overruled, and this ruling is assigned as error. In the original motion many causes are noted, but we will consider only those here argued by appellant. Appellant insists that the decision of the court is contrary to the evidence and contrary to law. The evidence in this cause clearly establishes that at the time of the marriage of appellant with appellee's decedent, each had a separate estate, personal and real. The same was kept separate and apart from the other and treated as separate estates during their entire married life. One witness testified that he had known the appellant about fifty years and had been on friendly terms with him during that time, and in a conversation relative to the property of himself and wife, and the right of one to the property of the other, and as to a contract or agreement between himself and wife, appellant said there was both an agreement and contract in black and white, and that both had signed it. He said she should receive nothing and he should receive nothing, he had enough. Another witness testified to having heard the same conversation, and that Mr. Unger said: "That was all fixed in black and white; when she dies I get nothing of her property, and when I die she gets nothing of my property, I have enough." The scrivener who prepared the will of decedent testified that appellant and his wife came to his office, and Mr. Unger told him that his wife wanted to make her will, and "he said, 'I want her

to make her will,' and we sat down to the table that was there in the office and I took down in pencil memorandum the will, the points * * * as they were given to me there by Mrs. Unger, in the presence of Mr. Unger, * * * and after it was in typewriting I read the will to them, and Mrs. Unger signed it in my office, in the presence of Mr. Unger. * * * He said that he did not want any of her property; that he wanted Aunt Eliza * * * to do with the property as she pleased, and the will was written that way." The foregoing is a substantial statement of the evidence supporting the contention of appellee.

In this State common-law property rights, as between husband and wife, have been modified, yet by virtue of the marital right the law casts upon each a contingent interest in the other's property, which, in the event of death, becomes fixed in the survivor, and which can be abridged or taken away only to the extent stipulated in a marriage settlement.

Such settlements or contracts, like all other contracts, must be supported by a consideration. Marriage furnishes a consideration for an antenuptial agreement, and

7. such agreement will be effective to control the marital right of each in the estate of the other, although the law may provide a different rule. *McNutt v. McNutt* (1889), 116 Ind. 545, 562, 2 L. R. A. 372, and authorities there cited.

In the case at bar appellee rests his defense to the petition upon what is claimed to be a postnuptial contract, whereby each was to hold his or her antenuptial

8. property to his or her separate use, and on the death of one the survivor to have no marital claim on the estate of the other. Unlike antenuptial contracts, marriage furnishes no consideration for a postnuptial agreement. "In the one case it prevents the inchoate right from attaching, while, in the other, it can at the utmost do no more

than remove it after it has attached." Bishop, Law of Married Women, §430.

There is absolutely no evidence of any transfer of property from either of the parties to the other or a release of any present or contingent interest, by any mode

9. known to the law. The inchoate interest of the wife in the lands of her husband is not an estate which can be conveyed without joining with it the interest of the husband. *Davenport v. Gwilliams* (1892), 133 Ind. 142, 22 L. R. A. 244; *Rupe v. Hadley* (1888), 113 Ind. 416; *Frain v. Burgett* (1898), 152 Ind. 55; *Ohio Farmers Ins. Co. v. Bevis* (1897), 18 Ind. App. 17; *Howlett v. Dilts* (1892), 4 Ind. App. 23. It has also been held that the husband's interest in the wife's land "is precisely of the same character as the wife's inchoate interest in his real estate." This being true, he had no present interest in his wife's real estate which could have been separately conveyed for any purpose. *Huffman v. Copeland* (1894), 139 Ind. 221, 229.

As we see the evidence in this case, there is a failure of proof to show any consideration to support the agreement to forego the marital right each had in the other's

10. property. But if it could be concluded that the contract was of such a nature that the release of the inchoate interest of the one should be considered as a sufficient consideration for the release of the inchoate right of the other (and there is no evidence of such fact), then the contract would be executory, and of no binding force in case either should choose to disregard it, and claim the provision made by law.

The personal property of each remained in the possession and under the absolute control of its owner, and was subject to the disposition of such owner, without the con-

11. sent of the other party to the agreement. There was nothing in the contract proved to prohibit such disposition, and, this being true, it follows that either was

at liberty to revoke such agreement at any time. Appellant disaffirmed the testamentary disposition made by his wife of her property, and is demanding his rights under the law. This, under the facts here appearing, he is at liberty to do. In view of this conclusion, we deem it unnecessary to notice any other questions here presented.

Judgment reversed, with instructions to grant a new trial, and the right to the parties to amend the pleadings if either of them so desires.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY v. SNOW, ADMINISTRATOR.

[No. 5,153. Filed June 7, 1905. Rehearing denied April 27, 1906.]

1. PLEADING.—*Complaint.—Motion to Make More Specific.—Railroads.—Defective Switch Locks.*—It is not error to overrule a motion to make more specific a complaint alleging that defendant railroad company negligently left a switch open at a time when it should have been locked; that such switch and lock were insufficient and so out of repair that the switch could not be securely locked and fastened and that defendant negligently allowed such lock, switch and target to be and remain out of repair, weak, insufficient and defective. *Tipton Light, etc., Co. v. Newcomer*, 156 Ind. 348, distinguished; *Ohio, etc., R. Co. v. Heaton*, 137 Ind. 1, followed. p. 649.
2. SAME.—*Complaint.—Railroads.—Open Switch.*—A complaint showing that defendant negligently left and permitted the lock, switch and appliances to become and remain open at a time when the switch should have been closed and locked, sufficiently shows negligence in the management of the switch. p. 650.
3. APPEAL AND ERROR.—*Appellate Court Rules.—“Condensed Recital of Evidence.”*—A brief containing seventy-six printed pages of the evidence, including much as originally given as well as arguments and objections of counsel interspersed, is not a “condensed recital of the evidence” as required by Appellate Court rule 22. p. 651.
4. SAME.—*Bills of Exceptions.—Evidence.—Models.—Whether in Record.*—Where the bill of exceptions shows that a model of a

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railway switch and certain other appliances were used by the witnesses in their testimony, but such articles are not included in the bill of exceptions, such testimony will be considered in the record, certain photographs of such articles being included in the bill, from which the court can ascertain the meaning of such testimony. p. 652.

5. TRIAL.—*Instructions.—Master and Servant.—Railroads.—Care.*—An instruction that a railroad company owes its engineer the duty to keep its switches, targets, locks and appliances in good repair, "so that it will be safe for its employes to discharge their duties," is erroneous, reasonable care only being required. p. 652.
6. MASTER AND SERVANT.—*Ways, Works and Machinery.—Defective by Use.—Care Required.*—Where the master installs modern and safe machinery, and by usage such machinery becomes insecure and dangerous, the master is not liable unless he knows or by the exercise of reasonable care should know such machinery is insecure and dangerous. p. 653.
7. APPEAL AND ERROR.—*Erroneous Instructions.—How Cured.*—An erroneous instruction is not cured by the giving of other instructions which are correct. p. 654.
8. SAME.—*Inconsistent Instructions.—Misleading.*—The giving of inconsistent instructions, calculated to mislead the jury, is reversible error. p. 655.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Thomas H. Snow, as administrator of John Critz, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment on a verdict for plaintiff for \$6,000, defendant appeals. *Reversed.*

C. E. Cowgill, John T. Dye and A. B. Everhard, for appellant.

Chipman, Keltner & Hendee, Bagot & Bagot and R. M. Van Atta, for appellee.

ROBINSON, J.—Action by appellee, as administrator of the estate of John Critz, deceased, for damages for personal injuries resulting in the death of Critz. Trial by jury. Verdict and judgment for appellee.

Overruling (a) appellant's motion to make the complaint more specific, (b) the demurrer to the complaint,

(c) the motion for judgment on the answers to interrogatories, and (d) the motion for a new trial, are assigned as errors.

The complaint avers that on January 5, 1901, and for many years prior thereto, Critz was in appellant's employ as engineer of a passenger-train; that a switch track led from the main track to a factory, and for several years there had been a switch target for throwing the switch to turn cars from the main track to the switch track; that appellant kept at the switch a target and padlock, which were so attached that when in good repair and securely locked the switch would remain in the position in which it was left by appellant, and thereby prevent the switch from being changed without the act of appellant and its servants and employes; that when the switch, target and padlock were in good condition and repair, and securely locked and fastened, it was safe for appellant to operate its trains over the switch and track at that point; that it was decedent's duty to run and operate a train at great speed over the main track without entering the switch, and that he had nothing to do with the maintenance, inspection or repair of the switch, or the appurtenances connected therewith, and that it was not any part of his duty to inspect or care for the same; that on the above date, and continuously to that date from September 1, 1900, the switch, target and padlock were insecure, insufficient and out of repair, so that the switch could not be and was not securely locked and fastened, but the "lock, target and switch were by the defendant negligently and carelessly allowed to be, become and remain out of repair, and to be and remain weak, insufficient and defective, all of which defendant well knew and could have known by ordinary care and diligence;" that the decedent, in the discharge of his duty, and in compliance with the requirements of the appellant, was running the engine at from forty to sixty miles an hour at the time

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of reaching the switch; that appellant had "carelessly and negligently installed, left and permitted said padlock, target, switch and the appliances connected therewith to be, become and remain out of repair, unlocked, unfastened, insecure and open at a time when the same should have been securely closed and locked to enable said train to pass over said main track, so that previously to and on the approach and attempt of said engineer John Critz, deceased, to pass his said engine and cars over and on the main track where it intersects said switch said engine was violently thrown from the track, and said decedent thereby killed;" that decedent had no notice or knowledge of such defective condition, or that the same was open, and could not have known the same by the use of ordinary care.

The motion to make the complaint more specific in certain particulars, we think, was properly overruled. It

alleged that the "defendant" negligently left the

1. switch open at a time when it should have been closed and locked. It also alleged that for a period stated the switch target and lock were insufficient and out of repair, so that the switch could not be, and was not, securely locked and fastened, but that the lock, switch and target were by appellant negligently allowed to be and remain out of repair, and to be and remain weak, insufficient and defective. It is argued that the pleading does not state sufficiently what the defects were, and wherein located, and the case of *Tipton Light, etc., Co. v. Newcomer* (1901), 156 Ind. 348, is cited. In that case it was alleged that the company had negligently permitted its high-pressure line "to become defective, insufficient and out of repair;" and it was held that the pleading failed to show how it had become defective, or how it was insufficient, or how out of repair. In the case at bar it is averred that when appellant kept the switch, target and lock in good repair, and securely locked, the switch would remain in the position in which left by appellant, and that when they were in good

condition and repair, and securely locked and fastened, it made it safe for appellant to operate its trains over the switch and track at that point. The two acts of negligence alleged in the pleading are that appellant negligently left the switch open at a time when it should have been closed, and requiring decedent to run a train over the same without notice of such defect, and negligently using in connection with the switch a defective lock which rendered the use of the switch unsafe, and requiring decedent to use the same without notice of such defect.

The lock and switch are parts of one apparatus, and the defective lock rendered the switch dangerous. In alleging the defect, the pleading speaks of the switch, target and lock, and avers that when they were in good condition and repair, and locked and fastened, it was safe to operate trains over the switch and track at that point; that at the time in question this lock and switch were insecure, insufficient and out of repair, so that the switch could not be and was not securely locked and fastened, but that appellant negligently allowed the lock and switch to become and remain "out of repair, and to be and remain weak, insufficient and defective." The theory of the pleading seems to be that the injury resulting in decedent's death was caused by the defective lock, and we think the language used by the court in *Ohio, etc., R. Co. v. Heaton* (1894), 137 Ind. 1, is applicable here. In that case, in sustaining the overruling of a motion to make a complaint more specific as to alleged defects in a lock, the court said: "To say of the lock that it was 'old, worn out, out of repair, broken, and unsafe,' was certainly sufficient, and even more than sufficient, to apprise the appellant of the charge made as to its defective condition."

In support of the demurrer to the complaint counsel argue that if the open condition of the switch was one of the two acts of alleged negligence that caused the in-

2. jury, then the complaint was defective in that it did not allege that appellant had knowledge or had

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opportunity for knowing of such condition. But the pleading alleges that the "defendant" had negligently left and permitted the lock, switch and appliances to become and remain open, at a time when the switch should have been closed and locked to enable the train to pass over the main track.

One of the grounds of the motion for a new trial is that the verdict of the jury is not sustained by sufficient evidence. Counsel for appellee insist in their brief

3. that no question is presented as to the sufficiency of the evidence, because of the failure to comply with rule twenty-two of this court. That rule provides: "If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely." What is intended as a recital of the evidence occupies seventy-six pages of appellant's printed brief. In many places are set out the questions and answers on direct, cross-examination and reëxamination of witnesses, and running through this recital of the evidence are numerous arguments of counsel upon the evidence as to what it does or does not prove. There can be no doubt as to what is meant by a "condensed recital of the evidence in narrative form so as to present the substance clearly and concisely," nor can there be any doubt that the purpose intended to be subserved by this rule is to present the substance of the evidence as given at the trial, in a connected form and as concisely as possible. We do not think there has been such a compliance with the rule in this case as entitles appellant to a review of the question that the evidence was not sufficient to sustain the verdict. See *Boseker v. Chamberlain* (1903), 160 Ind. 114; *Indiana, etc., R. Co. v. Ditto* (1902), 159 Ind. 669; *Franklin Ins. Co. v. Wolff* (1903), 30 Ind. App. 534; *Harrold v. Fuenfstueck* (1903), 31 Ind. App. 275.

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It is also earnestly insisted by counsel for appellee that not all the evidence is in the record. It appears that a model of a railway switch and certain other appliances

4. were used by some of the witnesses in their answers to questions, by way of demonstration, and in some instances the operation of these models was a material part of the answers of the witnesses. While we can not commend the method in which the evidence is here presented, where these models and appliances were used by witnesses in giving their testimony, however, when this testimony is considered in connection with certain photographs and a map or plat which were put in evidence, we may determine what the witnesses meant. *White v. Cincinnati, etc., Railroad* (1904), 34 Ind. App. 287.

Complaint is made of certain instructions. Instruction eleven, given by the court at the request of appellee, is as follows: "It is the duty of a railroad company to

5.. keep its switches, targets, locks and appliances upon its road and right of way in good repair, so that it will be safe for its employes to discharge their duties, and if the defendant company failed to keep the lock in repair at the place where the plaintiff was killed, so that by reason of such want of repair, the decedent's train, without fault upon his part, and without knowledge on his part of such condition, was turned from the main track to the side-track, and the engine overturned, and the decedent killed, then, in that case, I charge you that the defendant would be liable to the plaintiff in this case." We think this instruction is too broad, so far as it undertakes to define the duty owing from the appellant to the decedent. It is the duty of an employer to make the working place of its employes safe, but this duty is performed if the employer exercises reasonable and ordinary care. The instruction leaves the jury to conclude that the duty to make switches and appliances upon its road and right of way safe is absolute, and that if they should find that the switches and appliances were

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not safe, the negligence of the company would be established; that is, although the evidence might show that the appliances were all that reasonable and ordinary care would suggest, or that the highest degree of care had been exercised to keep these appliances in repair, yet the jury, under this instruction, were told in effect that they were required to decide the one question only, namely, whether the appliances were or were not safe. The general rule has often been approved that the employer must exercise ordinary skill and care in providing the employe with a safe working place and with safe machinery and appliances. To say that the employer must provide safe appliances, and that if he fails to do so, and an injury results, there is a liability, is equivalent to saying that the employer becomes, through the contract of hiring, an insurer against injury. In the contract of hiring there is an implied undertaking that the employer will use all reasonable care to furnish safe premises and appliances for conducting the business safely. *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151; *Krueger v. Louisville, etc., R. Co.* (1887), 111 Ind. 51; *Pennsylvania Co. v. Whitcomb* (1887), 111 Ind. 212; *Wabash Paper Co. v. Webb* (1896), 146 Ind. 303.

We think the instruction objectionable for another reason. It proceeds upon the theory that if the switches and appliances were defective at the time of the in-

6. jury, it was because appellant had failed to keep them in repair, not that appellant had installed defective appliances, and was maintaining them at the time of the injury. If defective appliances were put in and maintained, appellant was necessarily bound to know they were defective at the time of the injury. But if the appliances when put in were proper appliances, and were not in repair at the time of the injury, the company might or might not be bound to know they were not in repair. If they were out of repair, and appellant knew it, or if they had been out of repair for such length of time that appel-

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lant would be charged with notice, appellant must answer for such defective condition. But if the appliances when installed were in proper repair, and appellant had no notice that they had become out of repair, and the exercise of reasonable diligence on its part would not have discovered that they were out of repair, there would be no neglect of duty in failing to repair. Of course the employer must know whether appliances will become out of repair through continued use, but that element does not enter into the instruction in question. The instruction tells the jury that appellant would be liable for this want of repair, and this regardless of whether it had knowledge, actual or constructive, of such want of repair. The evidence and the jury's answers to interrogatories show that the alleged defect in the switch was in the lock, and that it was a latent defect. It is quite true that the duty of appellant to provide reasonably safe appliances was a continuing one, but if a reasonably safe lock had been provided, and it afterwards got out of repair, appellant could not be charged with negligence in maintaining it in that condition unless it knew the lock was out of repair, or could have known it by the exercise of ordinary care. See *Evansville, etc., R. Co. v. Duel* (1893), 134 Ind. 156, and cases cited; *Creamery, etc., Mfg. Co. v. Hotsenpiller* (1900), 24 Ind. App. 122, and cases cited; *Pennsylvania Co. v. Congdon* (1893), 134 Ind. 226, 39 Am. St. 251; *Chicago, etc., R. Co. v. Fry* (1892), 131 Ind. 319; *Umbach v. Lake Shore, etc., R. Co.* (1882), 83 Ind. 191; *Louisville, etc., R. Co. v. Orr* (1882), 84 Ind. 50; 3 Elliott, Railroads, §1268; *Culver v. South Haven, etc., R. Co.* (1904), (Mich.), 101 N. W. 663.

The fact that the court correctly stated the law in other instructions given does not cure the error. "This could only be done," said the court in *Wenning v. Teeple*

7. (1896), 144 Ind. 189, "by plainly withdrawing the instructions named from the jury, which was not done in this case. * * * Besides, if two or more

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instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, it is a cause for reversal." See, also, *Pittsburgh, etc., R. Co. v. Noftsgar* (1897), 148 Ind. 101; *Chicago, etc., R. Co. v. Glover* (1900), 154 Ind. 584; *Indiana Nat. Gas, etc., Co. v. Vauble* (1903), 31 Ind. App. 370; *Southern Ind. R. Co. v. Moore* (1902), 29 Ind. App. 52. The motion for a new trial should have been sustained.

Judgment reversed.

CORR v. MARTIN, TREASURER.

[No. 5,704. Filed May 8, 1906.]

1. **TAXATION.**—*Time of Listing Personal Property in 1903.*—*Real Estate.*—*Statutes.*—Under §§8418, 8419 Burns 1901, Acts 1891, p. 199, §§8, 9, personal property was listed for taxation in 1903 as owned on April 1, and one owning the legal title to real estate of said date became personally liable for the payment of the taxes thereon. p. 658.
2. **DEEDS.**—*Escrow.*—*Title.*—A deed held in escrow conveys no title. p. 659.
3. **TRIAL.**—*Special Findings.*—*Deeds.*—*Escrow.*—*Delivery.*—The delivery of a deed held in escrow is an ultimate fact to be found in terms by the court; and to constitute a delivery there must be an intentional parting with the title. p. 659.
4. **DEEDS.**—*Delivery.*—*Recording.*—*Possession.*—*Presumptions.*—There is a disputable presumption that a deed in the possession of the grantee, or recorded by the procurement of the grantor, has been delivered. p. 659.
5. **TAXATION.**—*Bills and Notes.*—*Mortgages.*—*Delivery.*—Notes and a mortgage securing same, delivered in part payment of the purchase price of a farm on April 8, 1903, are not assessable against the payee and mortgagee for taxes for the year 1903, although the contract for such land was made prior to April 1, 1903, and the deed held in escrow on such date. p. 659.

From Monroe Circuit Court; *James B. Wilson*, Judge.

Suit by Charles G. Corr against Peter B. Martin, as county treasurer of Monroe county. From a decree for plaintiff for less than prayed, plaintiff appeals. *Reversed.*

Duncan & Batman and Myers & Corr, for appellant.
Arthur M. Hadley, for appellee.

ROBY, C. J.—Suit to enjoin the collection of taxes. The court made a special finding at the defendant's request, and stated two conclusions of law thereon, in accordance with which it rendered a judgment enjoining the collection of \$62.80 of said taxes, and found for the defendant, as to \$141.30 thereof. Appellee did not except to the first conclusion of law, and presents no question thereon. Appellant did except to the second conclusion, and by assignment of error presents for review that part of the judgment based upon such conclusion.

The substance of the facts found, omitting those not necessary to the decision of the questions presented upon this appeal, is as follows: On January 10, 1903, appellant and others entered into a written agreement with one Faris, by which they agreed to convey to him certain real estate situate, described, in Monroe county, and to furnish an abstract of title thereto on or before April 15, 1903, showing a good title in and to said real estate. The entire consideration was payable to appellant. The consideration was \$7,000, of which \$500 was payable in cash on or before January 15, and \$1,000 in cash on or before the execution of the deeds on April 15. The residue of said purchase money to be evidenced by promissory notes secured by mortgage and payable yearly thereafter. That part of said real estate known as the "Ridge farm" to be mortgaged to secure \$3,500 of said notes, and the residue to be mortgaged to secure \$2,000 of said notes. It was further agreed that the vendors should sign and acknowledge deeds to said real estate immediately, which with said payment of \$500, should be placed in escrow in a bank mentioned, to be held by it until abstracts showing good title should be furnished, when said bank was to pay over to appellant said \$500, and said deeds were to remain in escrow until April 15, at

which time the further sum of \$1,000 was to be paid in cash and the notes and mortgage above mentioned were to be executed and possession of said real estate delivered to the purchaser. In pursuance of said agreement said \$500 was paid in January. On February 13 said vendors, with their respective wives, signed and acknowledged deeds and placed them in said bank in escrow according to the terms of said agreement. About the same time said Faris signed notes for \$3,500 and signed and acknowledged a mortgage covering the Ridge farm, and placed said notes and mortgage, with a check for \$1,000, in escrow in said bank, which said amount of \$4,500 was the entire consideration for the Ridge farm. On April 8 he executed two notes for \$1,000, each with a mortgage to secure the same on the residue of said real estate, and on said day delivered said notes and mortgage to appellant. "On said day, by agreement of the parties, said deeds theretofore signed and acknowledged by said Corr, Corr and Corr, for all of the real estate above mentioned, and which were held in escrow by the First National Bank, were delivered to said Faris and said mortgage signed and acknowledged by said Faris on February 3, 1903, on the Ridge farm, together with the notes which were secured thereby, with the \$1,000 in cash, which were held in escrow by the First National Bank, were delivered to said plaintiff pursuant to the terms of said written contract. Both of said mortgages were recorded on April 11, 1903, in the recorder's office of Monroe county, Indiana." The county treasurer and county auditor of Monroe county thereafter listed and assessed against plaintiff for taxation, for the year 1903, the sum of \$6,500, as omitted personal property of plaintiff. "Said \$6,500 so assessed is for the alleged indebtedness growing out of said sale of the real estate heretofore set out in the finding other than the \$500 cash payment made in January, 1903, and no other property."

Corr v. Martin—37 Ind. App. 655.

Personal property in 1903 was listed for taxation with regard to the quantity and quality held or owned on April

1. §§8418, 8419 Burns 1901, Acts 1891, p. 199,

1. §§8, 9. Appellant, holding the legal title to the real estate described, at that time, became personally liable for the payment of taxes assessed thereon. *Millikin v. Reeves* (1880), 71 Ind. 281, 285. The facts, so far as heretofore stated, show appellant to have held the legal title to said real estate on April 1, while the notes and mortgages constituting the alleged indebtedness, on account of which the further assessment was made, were undelivered, not his property, and only to become his property upon conditions which might never exist. This was the holding of the trial court, as expressed by its first conclusion of law. The second conclusion is based upon the following additional details of the transaction: Faris purchased said land for the purpose of reselling it. On February 16 he represented to appellant's attorney that he had a prospective purchaser and that he could sell the same better if the deeds were of record so they could be shown on an abstract of title, and asked permission, for that purpose, to put said deeds of record. Said attorney consented thereto. When said consent was so given, it was not the intention to deliver said deeds or either of them to said Faris, but said consent was solely given for the purpose of assisting him in making a sale of said real estate. On said day said Faris made to a third person a deed of conveyance of that part of said real estate known as the Ridge farm, reciting therein that immediate possession of said premises should be given and that the same was subject to an encumbrance of \$3,500 and the taxes of 1903, which deed was recorded July 6, 1903, the deed and the conditions therein being unknown to appellant and his representatives until it was so put on record. Appellant retained possession of all said real estate until April 8, 1903, when possession was surrendered under said contract.

The trial court held, as evidenced by its second conclusion of law, that the \$4,500 purchase money for the Ridge farm was properly listed. If the findings show that the

2. transaction to that extent was consummated prior to April 1, the conclusion is correct, otherwise not.

This question must be decided as between the original parties to such transaction, and no matter of estoppel which might or might not have arisen between the purchaser from Faris and appellant can in anywise influence it. A deed in escrow, before delivery, conveys no title. *Burkam v. Burk* (1884), 96 Ind. 270, 273.

The transaction did not become a completed one until the title of the real estate, in consideration of which notes and mortgage referred to were given, had passed.

3. Delivery of a deed or other instrument is an ultimate fact to be in terms found. *Fifer v. Rachels* (1906), 37 Ind. App. 275; *Indiana Trust Co. v. Byram* (1905), 36 Ind. App. 6. To constitute a delivery there must be an intention to part with control over the instrument and to place it under the power of the grantee or some one for his use. *Hotchkiss v. Olmstead* (1871), 37 Ind. 74; *Indiana Trust Co. v. Byram*, *supra*.

"If a deed is found in the possession of the grantee, or is recorded by the procurement of the grantor, a delivery will be presumed, but this presumption is not con-

4. clusive. Such facts are competent evidence of a delivery. From them there arises a presumption of a fact, which makes a *prima facie* case. This presumption may be overthrown by evidence." *Vaughan v. Godman* (1884), 94 Ind. 191.

The finding of the court is explicit that the notes and mortgage were delivered on April 8, and that the deeds for said real estate to Faris were also delivered on that

5. day. The finding that said deeds were recorded on February 16 is qualified by the further finding that such record was not made with the intention of delivery.

Any presumption of delivery which might be insisted upon from the fact of record is immediately overthrown by the statement of an intention which accompanies such finding and is also overcome by the finding of ultimate delivery upon the later date named.

These considerations lead to the conclusion that the notes and mortgage did not become tangible assets until the transaction was finally consummated, and were not therefore subject to taxation.

The judgment is reversed, and the cause remanded, with instructions to restate the second conclusion of law in accordance herewith and to render judgment thereon for appellant.

CINCINNATI, LAWRENCEBURG & AURORA ELECTRIC STREET RAILROAD COMPANY v. KLUMP.

[No. 5,692. Filed May 8, 1906.]

1. PLEADING.—*Complaint.—Damages to Property.—Negating Contributory Negligence.—Statutes.*—In an action for damages to personal property it is necessary to negative contributory negligence, as the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) did not change such rule. p. 662.
2. SAME.—*Complaint.—Damages to Property.—Negating Contributory Negligence.—Common Law.*—At the common law it was not necessary to negative contributory negligence in actions for damage to personal property. p. 662.
3. ACTION.—*Cause Arising in Another State.—Procedure.—Negligence.*—In an action brought in Indiana on account of negligent injuries received in Ohio, the Indiana procedure governs. p. 662.
4. PLEADING.—*Complaint.—Damages to Personal Property.—Negating Contributory Negligence.*—A complaint alleging that defendant street railway company negligently run its car against the rear of plaintiff's wagon, thereby injuring such wagon, its contents and three mules hitched thereto, while such wagon was being driven by a competent and experienced driver who was exercising due care and prudence, sufficiently negatives contributory negligence. p. 663.

Cincinnati, etc., St. R. Co. v. Klump—37 Ind. App. 660.

5. **TRIAL.**—*Interrogatories to Jury.*—*Answers.*—*Contradictions.*—*Effect.*—*General Verdict.*—Contradictory answers to interrogatories to the jury nullify each other, and the general verdict stands unless the answers are in irreconcilable conflict therewith. p. 663.
6. **APPEAL AND ERROR.**—*Appellate Court Rules.*—*Briefs.*—Questions not discussed on appeal are waived. p. 664.

From Dearborn Circuit Court; *George E. Downey*, Judge.

Action by Margratha M. Klump against the Cincinnati, Lawrenceburg & Aurora Electric Street Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Martin J. Givan, Frank B. Shutts and Stanley Shaffer, for appellant.

Clore, Dickerson & Clayton and Thornton R. Snyder, for appellee.

COMSTOCK, J.—Action by appellee to recover damages for injuries to personal property. The cause was put at issue, tried before a jury, a general verdict returned for appellee in the sum of \$620, together with answers to certain interrogatories. Over appellant's motion for a judgment in its favor on answers of the jury to interrogatories and for a new trial, the court rendered judgment for appellee upon the general verdict for the amount thereof.

The errors assigned are that the court erred in overruling the demurrer to the complaint, in overruling appellant's motion for judgment upon the answers to interrogatories notwithstanding the general verdict, in overruling appellant's motion for a new trial.

The complaint is in one paragraph. It alleges that the plaintiff was a citizen of Dearborn county, Indiana; that appellant is a corporation organized under the laws of the state of Ohio, doing business in Indiana; that appellant operated a line of electric railroad extending from Andersons Ferry to the city of Lawrenceburg, Indiana, and on

Cincinnati, etc., St. R. Co. v. Klump—37 Ind. App. 660.

September 13, 1904, at 11 o'clock a. m., negligently and carelessly, in the village of Addison, Hamilton county, Ohio, caused one of its heavy electric cars to be driven with great force and violence against the rear of the wagon of appellee, drawn by three mules and loaded with goods, wares and merchandise, and thereby knocked said wagon from said highway, overturned the same, and completely destroyed the wagon, crippled one of the mules attached to said wagon, of the value of \$150, so that it was necessary immediately to kill said mule, injured another one of the mules attached to said wagon, of the value of \$150, so as to render it worthless and crippled, injured the third mule attached to said wagon, and destroyed numerous articles of personal property then in said wagon, aggregating in all the sum of \$694.25. It is alleged that for injury to persons or property by negligence or wrongful act in the state of Ohio the right of action and the remedy are governed by the common law.

The objection made to the complaint is that it does not aver that the plaintiff was without fault. Since the case of *President, etc., v. Dusouchett* (1851), 2 Ind.

1. 586, 54 Am. Dec. 467, and which has been followed in numerous cases since, it has been the rule that a complaint for injury to personal property should show that the plaintiff was without fault. The act of 1899 (Acts 1899, p. 58, §359a Burns 1901), does not change the rule relative to damage suffered to one's property by reason of the negligence of another; it applies only to cases relating to personal injury or death. *Indian-*

2. *apolis St. R. Co. v. Robinson* (1901), 157 Ind. 232. Under the common law it is not necessary to negative contributory negligence. Although the cause of action arose in Ohio, and it will be presumed that the common law prevails in that state, yet the appellee seeking redress in this jurisdiction, the course of procedure

3. will be controlled by the law of Indiana. Story, *Conflict of Laws* (8th ed.), pp. 772-779; Holland,

Cincinnati, etc., St. R. Co. v. Klump—37 Ind. App. 660.

Jurisprudence (9th ed.), 390; *Smith v. Muncie Nat. Bank* (1867), 29 Ind. 158; *Burns v. Grand Rapids, etc., R. Co.* (1888), 113 Ind. 169, 174; *Baltimore, etc., R. Co. v. Ryan* (1903), 31 Ind. App. 597.

It is necessary, therefore, to consider whether the complaint before us negatives the contributory negligence of the plaintiff, for it is not insisted that it does not

4. sufficiently charge the negligence of the appellant.

It does not, in express terms, aver that the injury was without fault of the plaintiff, but such particular allegation is not necessary. Any words or allegations of fact that show that the plaintiff was not guilty of negligence contributing to the injury are sufficient. *Ft. Wayne, etc., R. Co. v. Gruff* (1892), 132 Ind. 13; *Duffy v. Howard* (1881), 77 Ind. 182; *Sale v. Aurora, etc., Turnpike Co.* (1897), 147 Ind. 324. The complaint avers "when plaintiff's covered spring wagon, laden with a heavy weight and a large amount of various kinds of produce and being drawn by a team of three mules then and there being driven for the plaintiff by a competent and experienced driver, with due care and prudence, eastwardly and along and over the track of said railway in a public highway in the village of Addison," etc. These words sufficiently show that the plaintiff had as her servant a careful and experienced driver, and that he was driving with due care and prudence, and sufficiently show that the plaintiff was not guilty of negligence contributing to the accident.

We do not deem it necessary to set out even a summary of the facts specially found. Some are inconsistent with others, but under the rule those in conflict nullify

5. one another. A general verdict finds all the material allegations of the complaint to be true. Special findings control only when there is an irreconcilable conflict between them and the general verdict. Such conflict does not appear. *Rhodus v. Johnson* (1900), 24 Ind. App. 401.

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The motion for a new trial is not discussed. The third specification of error is therefore waived, but we
6. have read the evidence and find that the verdict is not without support.
Judgment affirmed.

ROBERTS, GUARDIAN, v. TERRE HAUTE ELECTRIC COMPANY.

[No. 5,558. Filed December 5, 1905. Rehearing denied February 14, 1906. Transfer denied May 8, 1906.]

1. **EVIDENCE.**—*Mental Incapacity.*—*Negligence.*—*Pleading.*—Evidence in chief of the mental incapacity of the plaintiff is inadmissible, where not pleaded, in a case of negligence. pp. 668, 672.
2. **SAME.**—*Mental Weakness.*—*Interurban Railroads.*—*Negligence.*—In an action on behalf of a minor twelve years old for damages for injuries caused by an interurban railroad company, wherein defendant, upon cross-examination, introduced testimony that such minor was of a reckless disposition, it is erroneous to exclude evidence in rebuttal showing that such minor was mentally weak. pp. 668, 671.
3. **TRIAL.**—*Evidence.*—*Peremptory Instructions.*—In granting a peremptory instruction for defendant the trial court can consider only the evidence and inferences favorable to plaintiff and must treat the evidence favorable to defendant as withdrawn. p. 671.
4. **SAME.**—*Interurban Railroads.*—*Backing Car over Streets without Lookout.*—*Negligence.*—*Question for Jury.*—The court cannot, as a matter of law, hold that an interurban railway company, in backing a freight-car without any lookout, around a corner and over a much frequented crossing, thereby injuring a minor twelve years old while attempting to cross ahead of such car, is not guilty of negligence, such question being for the jury. p. 671.
5. **SAME.**—*Contributory Negligence.*—*How Proved.*—Contributory negligence in personal injury cases is a defense which may be

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proved under the general denial, and defendant is entitled to have all evidence introduced by plaintiff on such issue considered. p. 671.

From Superior Court of Vigo County; *Orion B. Harris*, Special Judge.

Action by Henry Roberts, as guardian of Frank Roberts, against the Terre Haute Electric Company. From a judgment for defendant, plaintiff appeals. *Reversed*.

Stimson & Condit, Frank S. Rawley and John O. Piety, for appellant.

McNutt & McNutt, for appellee.

COMSTOCK, J.—Appellant sued appellee to recover damages for personal injuries inflicted upon his ward, by the alleged negligence of the appellee. The complaint is in one paragraph. It alleges, among other matters, substantially the following facts: The appellee owns and operates an electric interurban street railway, having its main line on Wabash avenue and a branch running north on Ninth street, in the city of Terre Haute. Said branch connects with the main line by a westward curve into Wabash avenue. For the purpose of carrying property it runs freight-cars over said railway, some of which are motor cars, other non-motor cars, which are propelled and controlled by coupling them to motor cars. It is highly dangerous for people using said street for trains and street cars to run on said street without a motor car at the front end of the train and a motorman to control said cars at the front of the car, in a position where he can see the tracks, the street and the people in the street in front of said train. While a party of citizens was passing and a crowd of spectators filled the street at that point, among whom was appellant's ward, the appellee negligently backed a freight-train consisting of two cars, the rear a non-motor car, around said curve from Ninth street, into Wabash avenue, and in so doing knocked said ward down, ran said motor

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over him, passing the wheels over his left arm and over three fingers of his right hand, mangling and crushing them so that it was necessary to amputate the left arm above the elbow and the three injured fingers. Appellee negligently failed to have any person on said motor car while backing it as aforesaid, and negligently placed the motorman who backed said train where it was not possible for him to see the track, or the street, or the people in front of said backing train, and negligently failed to place a lookout on said train in a place where he could see the track, or the street, or the people in front of said backing train, and that by reason of the appellee's negligent acts aforesaid said ward received said injuries.

Appellee answered by general denial. The issues were submitted to a jury for trial, and at the conclusion of appellant's evidence in chief, appellee moved that the court direct the jury to return a verdict for the appellee, which motion the court sustained. The jury returned a verdict as directed, and the court rendered judgment thereon in favor of appellee that the appellant take nothing by the action and that appellee recover its costs.

The errors assigned are that the court erred (1) in sustaining appellee's motion to strike out parts of the complaint; (2) in overruling appellant's motion for a new trial.

The following are the parts of the complaint stricken out, which is made the first error: (1) "Said interurban railway connects with an electric street railway in said city of Terre Haute, owned and rightfully operated by the defendant, as a common carrier for passengers only, and over which the defendant had no right to run freight-cars or carry property." (2) "On October 8, 1901, the defendant was unlawfully running a train of its said interurban freight-cars, and unlawfully carrying property thereon, over its said street railway within the city of Terre Haute, without first getting the consent of the proper authorities of said city to operate said railway within said city for the

purpose of carrying property or running freight-cars over said railway.”

Appellant argues that the using of the interurban freight-cars and the carrying of freight thereon over the lines of urban street railway, without the consent of the proper city authorities, is a wrong done to the general public, and that a wrong done to the general public that results in a special injury to a particular citizen gives to the injured party a good cause of action for damages. Text-writers and decisions are cited in support of this claim. The appellee was authorized to run interurban freight-cars over its tracks by the act of 1901 (Acts 1901, p. 461, §1, cl. 6, 8, §5468a Burns 1901). Under said act street railway companies desiring to construct, or having constructed, any interurban street railway, were granted, in addition to the rights, privileges and powers, already given and granted by law, certain special powers, to wit: “To take, transport, carry and convey persons and property on its said railroad and railroad systems, * * * and to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor.” The legislature may limit and restrict the authority a city has over its streets. The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. *Eichels v. Evansville St. R. Co.* (1881), 78 Ind. 261, 41 Am. Rep. 561.

The complaint does not allege that the appellee is not complying with the act of 1901, *supra*, but that the carrying of freight is done without the consent of the authorities of the town. The right of appellee to run freight-cars over its lines can not be questioned in this collateral way. In *Hine v. Bay Cities, etc., R. Co.* (1897), 115 Mich. 204, 73 N. W. 116, the action was to recover for injuries inflicted upon a child by a car operated by the railway company in a street. The car was moved by electricity, and the matter of authority to use such motive power was asserted and lia-

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bility predicated on such alleged kind of power. It was said: "We do not think this question can be raised in this proceeding. The fact was made to appear that the company did operate its cars by electricity, and for the purpose of this case the trial must proceed as though it had the right to do so. If the street railway company is operating its road contrary to the terms of its franchise, the question could undoubtedly be raised by the city in a proper proceeding, but we do not think the question is involved in this issue." *Baker v. Neff* (1880), 73 Ind. 68; *Crowder v. Town of Sullivan* (1891), 128 Ind. 486, 13 L. R. A. 647; *Chicago, etc., R. Co. v. Chicago City R. Co.* (1900), 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; *National Bank v. Matthews* (1878), 98 U. S. 621, 25 L. Ed. 188.

One of the reasons set out in the motion for a new trial, is the refusal of the court to permit plaintiff to show in rebuttal that the injured boy was a person of weak

1. mind. In making out his case appellant offered to prove the mental incapacity of his ward. The evidence was properly excluded, upon the ground that the mental condition of the injured party had not been pleaded. Later a witness for plaintiff testified that he had seen Frank

Roberts a short time before the accident at the corner

2. of Fourth and Main streets, next on the corner of Sixth and Main streets, and last on the corner of Ninth and Main streets, where he was injured. The witness stated that Roberts at Fourth and Main streets was doing nothing; that at Sixth and Main streets he was "on the street backwards and forwards." Upon cross-examination he testified that Roberts jumped in front of a car in motion, tantalizing the motorman; that a police officer asked him to get on the sidewalk; that he went across and got a white boy and they ran in front of the car two or three times; that the motorman told them to keep out of the way. The purpose of this testimony was manifestly to show the reckless disposition, giving character to the conduct of Roberts, up to

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a very short time before the accident. Mental incapacity is pertinent to the question of contributory negligence. We believe that appellant should have been permitted to lay before the jury his mental condition, that they might determine from the facts whether his apparently heedless conduct was or was not due to a weak mind. As the law now is a plaintiff in an action of this character has only to allege and show that he was injured by the fault of the defendant, the burden of proving negligence upon the part of the plaintiff resting upon the defendant. Upon rebuttal the evidence of incapacity was competent without pleading, and should therefore have been admitted.

The action of the court in directing the jury to return a verdict in favor of appellee is discussed. That instruction was given after the exclusion of evidence, which we think should have been admitted. The rule as to directing verdicts has been often stated, and most recently in this State in *Haughton v. Aetna Life Ins. Co.* (1905), 165 Ind. 32.

The judgment must be reversed for the reason stated, and as we do not wish to intimate any opinion as to the merits of the case with the excluded evidence admitted, we do not refer further to said rule. It was not error to strike out the parts of the complaint above given.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

Wiley, J.—I concur in the conclusion reached, on the sole ground that the court erred in excluding the evidence referred to in the opinion. Roby, C. J., concurs with Wiley, J.

ON PETITION FOR REHEARING.

ROBY, C. J.—Appellee's counsel support their petition for a rehearing by reference to the well-established doctrine that a judgment which is shown to be correct upon the facts will not be reversed on account of uninfluential error. It is true, as they contend, that in the absence of evidence

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tending to establish negligence upon the part of the defendant, the exclusion of evidence illustrating the care exercised by appellant's ward does not afford cause for reversal. The candid and intelligent argument directed to these propositions may not fairly be ignored.

It is averred in the complaint that appellee ran a train consisting of two cars backwards along Ninth street, around a curve into Wabash avenue, a street running at right angles to Ninth street, while a parade of citizens was passing and said streets were filled at that place with spectators; that it negligently backed said train around said curve and over said streets, and in thus doing knocked appellant's ward down and ran the car over him, inflicting the injuries complained of. It is also averred that appellee negligently failed to have a lookout on the non-motor car thus pushed upon said ward, and that it negligently placed the motorman where he could not keep a lookout.

The effect of the evidence is limited by the averments of the complaint. It does not appear that the absence of a lookout or the inability of the motorman to see the track caused or contributed to cause the injury complained of. The averment that the train was negligently started and backed around the curve requires the consideration of attendant circumstances, and its quality is largely determined by reference to them. A parade was passing over the streets, and a considerable number of spectators were present. The car which ran upon appellant's ward was a non-motor, freight-car, loaded and pushed west by a motor car attached. As these cars approached the place where the accident occurred, they were upon the north one of the two tracks maintained by appellees in said streets. A passenger-car was at the same time being run over the south track in an opposite direction. The boy, as the east-bound car passed, crossed the south track in its rear, and, running, stumbled and fell upon the north track ahead of the freight-car aforesaid, which ran upon him.

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Upon a motion for a peremptory instruction, the court is bound to accept as true all facts which the evidence tends to prove, and to draw, against the party requesting

3. such instruction, all inferences which the jury might reasonably draw, and, in case of conflict in the evidence, to consider only that favorable to the party against whom the instruction is asked, that favorable to the other party being treated as withdrawn. *Curryer v. Oliver* (1901), 27 Ind. App. 424.

It can not be said, as a matter of law, that backing the car in question along the street, under the attendant circumstances, was not negligent. Whether running

4. the opposing cars at the same time was negligent or not, in view of all the attendant circumstances, the time, place and manner of the occurrence, considered together, was a question for the jury.

This proposition is entirely distinct from the question of contributory negligence, upon which the running of opposing cars may have a bearing. *Chicago, etc., R. Co. v. Hedges* (1886), 105 Ind. 398. The court therefore erred in not submitting the issue of negligence tendered by the complaint.

While it is true that contributory negligence is a matter of defense, it may be proved under the general denial, and the defendant is entitled to the benefit of such evi-

5. dence as is relevant thereto, introduced by the plaintiff. It having been shown by the appellant that his ward attempted to cross the track and fell upon it, and questions directed to his conduct prior to the accident having been asked and answered on cross-examination, it would have been only fair to hear in the same connection evidence as to his mental quality. It is alleged that the ward was twelve years old. Whether he possessed

2. the judgment and prudence usually possessed by boys of that age, or whether he possessed less or more knowledge and prudence than boys of that age usually

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possess, was a matter of proof. He was bound to exercise all the care that he might reasonably have exercised by the employment of his faculties. *Keller v. Gaskill* (1894), 9 Ind. App. 670; *Citizens St. R. Co. v. Hamer* (1902), 29 Ind. App. 426. The appellant does not aver that his ward was *non sui juris*, and is not therefore in position to

1. assert such fact. *Cleveland, etc., R. Co. v. Klee* (1900), 154 Ind. 430; *Citizens St. R. Co. v.*

Hamer, supra.

The opinion herein contains a discussion as to the powers of an electric railway to operate their cars in city streets. The subject is of such importance that the majority of the court do not feel justified in deciding it upon the argument which has been made, and the expressions relative thereto are those of the judge writing the opinion.

Petition for rehearing overruled.

MARION TRUST COMPANY, TRUSTEE, v. CITY OF INDIANAPOLIS ET AL.

[No. 5,410. Filed October 25, 1905. Rehearing denied February 14, 1906. Transfer denied May 8, 1906.]

1. **STATUTES.—Construction.—Meaning.**—All parts of a statute should be construed together to ascertain its meaning. p. 676.
2. **MUNICIPAL CORPORATIONS.—Street Assessments.—Statutes for.—Strict Construction.**—At common law municipal corporations have no right to assess frontagers for the payment of the cost of street improvements, and statutes granting such right are construed strictly in favor of such frontagers and against such corporations. p. 676.
3. **SAME.—“Sidewalks.”—Meaning of.—Presumptions.**—A “sidewalk” means primarily a foot way along the side of a street, and the presumption is that such meaning is intended when such word is used in a statute. p. 677.
4. **STATUTES.—Construction.—Municipal Corporations.—Sidewalks.**—The statute (Acts 1897, p. 79, §1), providing that the board of public works of certain cities may “improve only a

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part, or one side of any street, or sidewalk, or other place," should be read as though the words "or sidewalk" were omitted, the second proviso of such section specifically covering sidewalks, and such second proviso being meaningless upon any other construction. p. 678.

From Superior Court of Marion County (66,698); *John L. McMaster*, Judge.

Suit by the Marion Trust Company, as trustee, against the City of Indianapolis and another. From a decree for defendants, plaintiff appeals. *Affirmed.*

Wilson & Townley, for appellant.

S. M. Richcreek and *J. M. Milner*, for appellees.

COMSTOCK, J.—Suit by appellant to quiet title against appellees to certain real estate in the city of Indianapolis. Appellees filed separate demurrers for want of facts to appellant's complaint. The court sustained these demurrers. Appellee City Bond Company filed a cross-complaint against appellant, seeking to foreclose a sidewalk improvement lien against the property described in appellant's complaint. Appellant filed an answer to this cross-complaint, setting up substantially the facts alleged in its original complaint. To this answer appellee City Bond Company demurred for want of facts, and the court sustained the demurrer. Appellant elected to stand upon its original complaint and upon its answer to the cross-complaint of the City Bond Company, and refused to plead further. The court thereupon rendered judgment against appellant, refusing to quiet appellant's title as prayed in its original complaint. The court also rendered judgment in favor of appellee City Bond Company upon its cross-complaint, and decreed the foreclosure of the sidewalk improvement lien above referred to.

Appellant assigns as error the action of the court in sustaining the separate demurrers of appellees to its complaint, and in sustaining the demurrer of the City Bond

Company to appellant's answer to the cross-complaint of the City Bond Company.

The material facts out of which the controversy arises, and which are alleged in appellant's original complaint and again in appellant's answer to the cross-complaint of the City Bond Company, are as follows: Appellant is the owner in fee simple of certain real estate abutting upon the west side of Central avenue in the city of Indianapolis. In April, 1903, the city, through its board of public works, took steps to improve said Central avenue by constructing a cement sidewalk along the west side thereof. After the proper proceedings had been taken, the contract was let, the improvement was made and completed, and the board assessed certain property with the cost of the improvement. The assessment made by the board was limited to the land abutting upon the west side of Central avenue, and the entire cost of the improvement was attempted to be assessed against said land. The west side of the street only was improved, the east side was not ordered improved, nor had it ever before been improved, nor has it since been improved with any sidewalk whatever. After the making of the above assessment by the board the contractor properly assigned his interest in the assessment to appellee City Bond Company, which is now the owner of the same. The land of appellant abutting upon the west side of Central avenue was assessed in the amount of \$1,942.95. Before its assessment was payable appellant tendered to appellees one-half of the above sum—namely, \$971.48—claiming that such tender was sufficient to discharge the lien of the assessment as against its property. This was upon the theory that the board had no power to assess more than one-half of the cost of the improvement against the land abutting upon the west side of the street, and that having unlawfully attempted to assess the entire cost thereof against said land appellant was only legally chargeable with one-half of the assessment which the board attempted to make. Appellees refused to

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accept the tender made by appellant. Thereupon appellant paid into court said amount of \$971.48 for appellees' use, and brought this suit to quiet title to its land as against the assessment in question.

The controversy in this case grows out of the construction to be given to the seventy-fourth section of the Indianapolis charter (Acts 1891, p. 137) as amended in 1897 (Acts 1897, p. 79, §1). The portion of said section material to the consideration of the question before us is as follows: "If said board shall finally order such improvement, and shall advertise for bids and let the contract for the same, the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned upon the lands or lots abutting thereon. The remaining one-half of the cost of street and alley intersections shall be apportioned upon the lands or lots abutting on the street or alley intersecting the street or alley under improvement for a distance to the street line of the first street extending across the said intersecting street or alley in either direction from the street or alley improved: Provided, that in case of intersections with diagonal streets or avenues the remaining one-half cost of each intersection shall be apportioned on the lands or lots abutting on each of the intersecting streets for a distance to the street line of the first street extending across each of said intersecting streets in each direction from the street improved. Should a street or alley enter into and not across the street or alley under improvement, then the assessment for the cost of one-half of said entering street or alley, measured to the center line of the street or alley under improvement, shall be made on the lots or lands abutting on said entering street or alley, for a distance to the street line of the first street extending

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across the said intersecting street or alley, and such last named assessment shall be made, pro rata upon the lots or lands abutting on said street or alley: Provided, however, that if it may be deemed necessary by the board of public works to improve only a part, or one side of any street, or sidewalk, or other public place in such city, then one-half of the cost of such improvement shall be assessed against and paid by such city, and the remaining one-half of the cost thereof shall be assessed against the lands or lots abutting upon and adjacent to such half or side of the street or alley so to be improved, as now provided by law: Provided, also, however, that when the board of public works orders the improvement of any sidewalk, the cost of the same shall be estimated according to its whole length, including the street and alley intersections, and shall be apportioned upon the lots or lands abutting thereon."

Appellant contends that this case is to be governed by the first proviso of the foregoing statute; appellees contend that the case is to be governed by the second proviso.

1. *viso*. The question is one of statutory construction.

All parts of the statute must be construed together to ascertain its meaning.

It need only be stated that municipal corporations have no inherent power to levy special assessments for street improvements. Such power exists only to the extent that it is expressly conferred by the legislature.

2. Statutes conferring upon municipal corporations the power to levy special assessments for street improvements are to be strictly construed against the municipality and in favor of the abutting property owners. The city of Indianapolis is given express statutory power to improve its streets at the expense of abutting property owners. Appellant relies upon the literal meaning of the first proviso. It says: "That if it be deemed necessary by the board of public works to improve only a part, or one side of any street, or sidewalk, or other public place in such city, then

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one-half of the cost of such improvement shall be assessed against and paid by such city, and the remaining one-half of the cost thereof shall be assessed against the lands or lots abutting upon and adjacent to such half or side of the street or alley so to be improved, as now provided by law."

Appellant insists that the improvement on the west side of Central avenue was the improvement of a part or one side of a sidewalk, within the meaning of the above provision. It is argued that a sidewalk improvement generally contemplates the construction of a sidewalk upon both sides of the street, and where only one side is improved it is natural to refer to the improved portion as a part or one side of a sidewalk.

The two provisos in controversy here became part of the seventy-fourth section of the city charter in 1897 (Acts 1897, p. 79, §1). Previous to that time the section was substantially as it now stands, except that it did not contain the two provisos in question (Acts 1895, p. 384). At that time the act provided generally: "The cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, * * * and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned upon the lands or lots abutting thereon." In other words, the statute at that time provided that the cost of any street improvement should be assessed against the land abutting upon the street improvement. *Indianapolis, etc., R. Co. v. Capital Paving, etc., Co.* (1900), 24 Ind. App. 114; *Drake v. Grout* (1899), 21 Ind. App. 534; *Klein v. Nugent Gravel Road Co.* (1904), 162 Ind. 509.

While the term "street" in ordinary legal signification includes all parts of the way—the roadway, the gutters and the sidewalk—yet the term sidewalk has come to be

3. generally used in this country for the purpose of designating a footway for passengers at the side of a street or road. Elliott, Roads and Sts. (2d ed.), §20;

Challins v. Parker (1873), 11 Kan. 384. In that sense the legislature is presumed to have used it.

The second proviso of the section relates only to, and provides for, the improvement of sidewalks. In enacting it the legislature must have had a purpose. It

4. radically differs from the first proviso as to the assessment of costs of the improvement. Unless it governs the improvement of sidewalks it is meaningless. The first makes provision "to improve only a part, or one side of any street, or sidewalk, or other public place in such city." This does not mean one side of a sidewalk. If "part" qualifies sidewalk, it would not apply to the case at bar, because the sidewalk is complete and entire. We think it plain that "or sidewalk" is by inadvertence or mistake in the statute; otherwise there appears contradictory and meaningless provisions in the same section. It is significant that the codification commission in reporting the section under consideration as §108 (Acts 1905, pp. 219, 288, §3532 Burns 1905) omitted from said text the word "sidewalk." This omission was probably for the reason, in the opinion of the commissioners, that the word was without meaning in the connection in which it was used. The demurrer to the complaint was properly sustained.

Judgment affirmed.

MALOTT, RECEIVER, v. JOHNSON.

[No. 5,675. Filed May 9, 1906.]

1. CARRIERS.—*Railroads.—Freight Seized under Legal Process.—Liability of Carrier.*—A common carrier is not liable in damages to the shipper for goods in transit taken upon legal process, in the absence of collusion. p. 682.
2. SAME.—*Railroads.—Garnishment.*—A common carrier, in possession of goods in transit within the jurisdiction of the court, is liable in garnishment. p. 683.

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3. **CARRIERS.**—*Railroads.—Garnishment.—Statutes.*—A common carrier is not relieved from liability to garnishment because of a contract to ship the goods constituting the subject of garnishment, since §951 Burns 1901, Acts 1897, p. 233, providing that the "garnishee shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time than he would be bound to do for the defendant," must be read in connection with §§944, 952 Burns 1901, §§932, 940 R. S. 1881, providing that such garnishee shall be "accountable to the plaintiff in the action for the * * * property" in his hands, and that such garnishee shall be relieved by payment of money due defendant to the sheriff or into court. p. 684.
4. **SAME.**—*Railroads.—Garnishment.—Jurisdiction.—Statutes.*—Under §931 Burns 1901, §919 R. S. 1881, providing that the plaintiff in garnishment may have judgment when the garnishee who has been summoned in the county where the action is brought is indebted to defendant or has property subject to attachment, the court has jurisdiction to render judgment against a railroad company having in its possession the property of a nonresident who has notice of such action only by publication. p. 685.
5. **SAME.**—*Railroads.—Garnishment.—Writ of Attachment Un-served.—Statutes.*—A judgment may be rendered against a garnishee though there be no service of the writ of attachment upon any goods belonging to the principal defendant (§943 Burns 1901, Acts 1897, p. 233). p. 686.

From Superior Court of Marion County (66,198);
James M. Leathers, Judge.

Action by Grafton Johnson against the Alton-Dawson Mercantile Company and Volney T. Malott, as receiver of the Terre Haute & Indianapolis Railroad Company. From a judgment for plaintiff, said receiver appeals. *Affirmed.*

John G. Williams and *D. P. Williams*, for appellant.

Miller, Elam & Fesler and *E. A. McAlpin*, for appellee.

WILEY, J.—The facts upon which the decision must rest are so fully and accurately stated in appellee's brief that we adopt the statement as our own, as follows: "In the lower court appellee sued the Alton-Dawson Mercantile Company, a foreign corporation, for an alleged breach of contract. Proper proceedings in attachment were insti-

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tuted at the time the suit was commenced. At that time, and at the time the writ of attachment was served, appellant had in his yards in Indianapolis a car load of canned goods belonging to the Alton-Dawson Mercantile Company, which had been shipped from Columbus, Indiana, and was *en route* to Oklahoma. At the time the writ of attachment was served this car of goods was awaiting shipment to Oklahoma, but had not been placed in a train for that purpose. The writ of attachment was served upon appellant's freight agent. The property was not taken into actual, manual possession by the sheriff at the time the writ was served, but was left with appellant's agent and in appellant's yards. When the writ was served, the agent gave the sheriff a receipt for the property, which was on November 6, 1903. By the terms of this receipt, appellant undertook to hold the property for the sheriff and subject to his order. The receipt is as follows:

‘November 6, 1903. Received of the sheriff of Marion county in the State of Indiana car No. 74,760 taken on writ of attachment in the case of Grafton Johnson v. The Alton-Dawson Mercantile Company, said car to be held until the further order of the sheriff. [Signed.] E. F. Graham, agent. 11-6-03.’

“A few days thereafter the sheriff issued an order to a storage company, directing it to take possession of the property, but appellant, through his agents, refused to surrender it, and retained it in his yards for about sixty days, when, through some error of appellant's employes, it was forwarded to Oklahoma, as originally billed. The sheriff never obtained actual, manual possession of the property. After appellant's refusal to surrender the property, appellee filed his affidavit in garnishment, in which he made appellant a garnishee defendant. In this affidavit, appellee alleged that appellant had in his possession the property above mentioned, which he refused to surrender pursuant to the writ of attachment. The garnishee summons was

issued November 16, 1903, and was served the same day. It was served while the property was in appellant's yards, in Indianapolis. Notice of the pendency of the suit was given the Alton-Dawson Mercantile Company by proper publication. It did not appear, and judgment was rendered against it by default. In the judgment it was decreed that the property in appellant's possession was, as against the Alton-Dawson Mercantile Company, liable to be sold to satisfy the judgment. After the property had been forwarded from appellant's yards, appellant filed an answer as garnishee defendant, to which appellee's demurrer was sustained. Appellant refused to plead further, and after a trial as to matters not admitted by appellant's failure to plead over, judgment was rendered against appellant for the value of the property. The judgment against the Alton-Dawson Mercantile Company was rendered while the car of goods was still in appellant's possession. The judgment against appellant was rendered after the goods had left his yards."

Sustaining the demurrer to appellant's answer and overruling his motion for a new trial are relied on for reversal. The answer avers that on November 6, 1903, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company delivered to appellant, the garnishee defendant below, in the city of Indianapolis, for carriage to the city of Peoria, Illinois, a car owned by said company, said car to be loaded with canned tomatoes, consigned by Preston Ryder to Alton-Dawson Mercantile Company, at Kingfisher, Oklahoma, with directions to forward the same over the lines of the company of which appellant was receiver, to certain connecting lines, etc. The answer concludes with averments substantially as follows: That on said November 6, 1903, while said car was in the yards of the Terre Haute & Indianapolis Railroad Company, in Indianapolis, for the purpose of being placed in a freight-train for carriage to Peoria, Illinois, the sheriff of Marion county served

garnishee defendant's agent in Indianapolis with a writ of attachment issued in this cause, and demanded delivery of the contents of said Pennsylvania railway company's car No. 74,760; that said agent, under advice of counsel, refused to deliver said contents to said sheriff; that garnishee defendant, under advice of counsel, says that the contents of said car are not subject to the attachment or garnishee process issued in this cause; that if the contents of said car do belong to defendant, it is the only property belonging to defendant in garnishee defendant's possession or control; that he is not indebted to defendant, nor has he any control or agency of any property, moneys, credits or effects of defendant, unless the contents of said car be the property of defendant.

Counsel for appellant, in discussing the sufficiency of the answer, base their argument upon the proposition that goods loaded in a car standing in the railroad yards of a

1. common carrier, waiting to be placed in one of such carrier's trains for transportation to and delivery at a point outside the State, having come into such carrier's possession by delivery from a connecting carrier, are in transit, and the carrier in whose possession the goods are, under such circumstances, can not be held liable as a garnishee defendant, in an action against the consignee of the goods.

The proposition relied upon by appellant is not supported by the authorities in this State. It is well settled that while a railroad company is required to receive and transport property offered for shipment, and must respond in damages for its failure to do so, yet it is excused from liability, when, without fault or collusion on its part, the property is seized by legal process and taken out of its possession. *Ohio, etc., R. Co. v. Yohe* (1875), 51 Ind. 181, 19 Am. Rep. 727; *Indiana, etc., R. Co. v. Doremeyer* (1898), 20 Ind. App. 605, 67 Am. St. 264; *Van Winkle v.*

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United States Mail, etc., Co. (1862), 37 Barb. 122; *Pittsburgh, etc., R. Co. v. Cox* (1905), 36 Ind. App. 291.

In the last case cited this court said: "If the property is in possession of the carrier, and the transit has not yet begun, or is completed, and is held by the carrier,

2. either at the place of shipment or the place of delivery, and the property is within the jurisdiction of the court issuing the process, there is no reason for holding that the carrier is not subject to garnishee process the same as individuals or other corporations." The following authorities are in point: *Landa v. Holck & Co.* (1895), 129 Mo. 663, 31 S. W. 900, 50 Am. St. 459; *Stiles v. Davis* (1861), 1 Black (U. S.) 191, 17 L. Ed. 33; *Cooley v. Minnesota, etc., R. Co.* (1893), 53 Minn. 327, 55 N. W. 141, 39 Am. St. 609. It was also held in the case of *Pittsburgh, etc., R. Co. v. Cox, supra*, that a railroad corporation is subject to garnishee process, and that in a proper case it must be held to respond as an individual or other corporation.

The supreme court of Missouri, in the case of *Landa v. Holck & Co., supra*, had this question under consideration, and in the course of the opinion it was said: "The broad proposition is laid down that the railway company, though it admits it had in its possession a car-load of lard in Jackson county, Missouri, belonging to the defendants in the attachment, at the time the writ of garnishment was duly served upon it, is not subject to garnishment because this lard had been delivered to it for transportation. * * * Why should a defendant in attachment, whose property is found in the hands of a carrier, be more favored than one whose property is seized in the hands of a private individual or a corporation who is not a carrier?"

In *Cooley v. Minnesota, etc., R. Co., supra*, it was held that a carrier is liable to be summoned as a garnishee in a proceeding against a shipper who has sent goods to it for transportation, and service of the summons will bind the

carrier as to goods of the defendant shipper in its possession within the jurisdiction of the garnishing court, to the same extent as in ordinary cases of garnishment. The following authorities are in point: 5 Am. and Eng. Ency. Law (2d ed.), 240; Rood, Garnishment, §37; Waples, Attachment and Garnishment (2d ed.), §449.

It is also urged by counsel that appellant can not be held liable because the property in controversy was received by him for transportation to a point outside of the

8. State of Indiana. In support of this proposition our attention is called to §951 Burns 1901, Acts 1897, p. 233, which provides that the "garnishee shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time than he would be bound to do for the defendant." Sections 944, 952 Burns 1901, §§932, 940 R. S. 1881, should be considered in connection with the section just quoted. By §944, *supra*, it is provided that the garnishee, from the day of the summons, shall be accountable to the plaintiff in the action for the amount of money, property, or credits in his hands, or due or owing from him to the defendant. Section 952, *supra*, relieves the garnishee from liability by paying the money owing by him to the defendant to the sheriff or into court. From necessity the enforcement of the garnishee process invariably results in some change in the relations between contracting parties, but the purpose of the statute is to protect the garnishee from unnecessary hardship. Appellant can not escape liability under the statute relied upon.

As was said in *Ohio, etc., R. Co. v. Yohe, supra*: "It cannot say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another state, and therefore he cannot have it."

Under the facts here the test is this: If appellant had yielded to the garnishee process, assuming that the pro-

ceedings were in all respects regular, would he have been relieved from liability in favor of the attachment defendant? This inquiry must be answered in the affirmative. The demurrer to the answer was properly sustained.

Under the assignment attacking the ruling of the court upon the motion for a new trial, counsel for appellant insist

that jurisdiction was not acquired by the trial court

4. because the property of the attachment defendant was not attached; that it was not actually seized and taken possession of by the sheriff. Counsel say: "In attachment and garnishment proceedings brought by a resident of the State of Indiana against a nonresident where such nonresident defendant does not appear and is served only by publication, the court can only acquire jurisdiction by attaching the property of such nonresident defendant." As an abstract proposition counsel may be correct in the above statement, but as applied to the facts here, it is unavailing.

Section 931 Burns 1901, §919 R. S. 1881, provides: "The plaintiff shall not have judgment in any such action except in some one of the following cases, viz.: (1) When the defendant shall have been personally served with process. (2) When property of the defendant shall have been attached in the county where the action is brought. (3) When a garnishee shall have been summoned in the county where the action is brought, who shall be found to be indebted to the defendant, or to have property or assets in his hands subject to the attachment."

In *Robbins v. Alley* (1872), 38 Ind. 553, in referring to this statute, the court said: "If the defendant is not a resident of the state, the plaintiff may have judgment wherever his action has been commenced in any of the following cases: First, when the defendant has been personally served with process; second, when property of the defendant shall have been attached in the county where the action is brought; or, third, when a garnishee shall have

been summoned in the county where the action is brought, who shall be found to be indebted to the defendant, or to have property or assets in his hands subject to the attachment."

If it be conceded that the writ of attachment was not, in fact, levied upon the property of the principal defendant, still appellant, as garnishee, might be proceeded

5. against, and required to surrender the property, or account for its value.

In *Newman v. Manning* (1883), 89 Ind. 422, it was held, in an attachment before a justice of the peace, where the summons against the principal defendant had been returned unserved, and no property had been attached, that there could be no valid judgment entered against the garnishee until after due notice by publication of the principal defendant had been had. Applying this rule to the facts here, as it is shown that due notice was given by publication as to the principal defendant, even if the property was not attached, the judgment against appellant as garnishee is valid.

By §949 Burns 1901, §937 R. S. 1881, it is provided that in an action of this character a return of "no property found" shall not affect the proceedings against the garnishee.

In 1897, the legislature amended §931 R. S. 1881, authorizing a proceeding against a garnishee, "whether a writ of attachment had been issued or not." §943 Burns 1901, Acts 1897, p. 233. In construing this section the Supreme Court, in *Pomeroy v. Beach* (1898), 149 Ind. 511, say: "The amendment of 1897 makes provision for garnishee summons without a writ of attachment being issued, and that a judgment may be recovered against the garnishee where no writ of attachment has been issued." Under the amended statute, as under the former, an affidavit in attachment must be filed, and also an affidavit in garnishment before the issuing of the garnishee writ. This was done.

Here garnishee summons was served while the property of the principal defendant was in the possession of appellant, and as we have seen in the former part of this opinion, appellant could not take refuge from the garnishee process on the ground of being a common carrier. It logically follows, therefore, that if jurisdiction was not acquired by the attachment, it was by the service of the garnishee summons. This being true, appellant is bound by the judgment against him.

Judgment affirmed.

SHETTERLY ET AL. v. AXET ET AL.

[No. 5,910. Filed February 16, 1906. Rehearing denied May 9, 1906.]

1. PLEADING. — *Complaint.* — *Exhibits.* — *Wills.* — *Partition.* — *Quieting Title.*—In a cross-complaint for partition, the will, under which all parties claim title, is not the foundation of the action and therefore is not a proper exhibit, and can not be considered. p. 688.
2. SAME.—*Answer.*—*Sustaining Demurrer to Paragraph Whose Facts Are Provable under Another.*—Sustaining a demurrer to a paragraph of answer whose facts are provable under another paragraph is harmless error. p. 688.
3. SAME.—*Complaint.*—*Partition.*—*Possession.*—A cross-complaint showing that the cross-complainant and defendants are the owners as tenants in common of certain lands and praying partition thereof is sufficient without any direct allegation of possession of such real estate by cross-complainant, the allegation of ownership being in effect an allegation of possession or right thereto. p. 689.

From Johnson Circuit Court; *William J. Buckingham*, Judge.

Suit by Henry C. Axt and others against George G. Shetterly and others. From a decree for plaintiffs, defendants appeal. *Reversed.*

William Featherngill, for appellants.

Miller & Barnett and White & Owens, for appellees.

ROBY, C. J.—Suit by appellees for a partition of certain described real estate, and to quiet their titles. Appellant

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Shetterly was made a defendant, and answered in two paragraphs: (1) General denial; (2) setting up facts, the detail of which is not at present material. He also filed a cross-complaint, making the plaintiffs and his codefendant, guardian of Clara Shetterly, defendants. Said guardian demurred to said cross-complaint for the reason that the same did not state sufficient facts to constitute a cause of action. The plaintiffs likewise demurred for the same reason. The record shows plaintiffs' demurrer to have been sustained to the second paragraph of said appellant's answer. Demurrers to the cross-complaint were sustained. Trial had, general finding for appellees, and judgment accordingly.

The controversy grows out of a difference of opinion as to the meaning and construction of the last will of Christian

Axt, deceased, under whom all parties claim. All

1. questions argued by said appellant relate to the construction of said instrument, a copy of which is filed with the second paragraph of answer and cross-complaint and attempted to be made a part thereof by reference. Appellees make the point in their brief, to which said appellant has not replied, that such instrument is not the foundation of the action, and therefore can not be made part of the pleading by exhibit and reference. The proposition is supported by many decisions. *Eddy v. Cross* (1901), 26 Ind. App. 643; *Jewett v. Perrette* (1891), 127 Ind. 97. It follows that no question relative to the construction of said will can be considered, and that the sufficiency of the pleadings must be determined without reference to the exhibit.

The facts set up in the second paragraph of answer are provable under the general denial. §§1067, 1083 Burns 1901, §§1055, 1071 R. S. 1881. The judgment can

2. not, therefore, be reversed on account of the sustaining of such demurrer. *Wickwire v. Town of Angola* (1892), 4 Ind. App. 253.

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It is averred in the cross-complaint that the cross-complainant and the defendants thereto are the owners as tenants in common of certain real estate therein de-

3. scribed. It is further stated that George Shetterly is the owner of an undivided one-eighteenth, and the plaintiffs each one-sixth part thereof, and that defendant Clara Shetterly owns an undivided two-eightieths part thereof; that defendants Hammond and Ditmars are made defendants to answer to their interests, if any. The prayer is for partition and that the parties named "be declared the owners of said real estate in the shares above set out and for all other proper relief." The pleading states that the cross-complainant and the defendants are the owners as tenants in common of the land. It shows the interests of the several parties with exactness. It is not necessary to partition of real estate that the party seeking such relief be in possession of the lands. *Godfrey v. Godfrey* (1861), 17 Ind. 6, 79 Am. Dec. 448.

Other objections to the complaint made are based upon the provisions of the will, and for the reasons above stated are not available. The cross-complaint was sufficient as an application for partition. §1201 Burns 1901, §1187 R. S. 1881.

For error in sustaining the demurrer to the cross-complaint, the judgment is reversed, and the cause remanded, with instructions to overrule such demurrer, and for further consistent proceedings.

ON PETITION FOR REHEARING.

COMSTOCK, J.—Counsel for appellee earnestly ask for a rehearing in this cause upon the ground that the cross-complaint does not show title, nor either possession

3. of or the right to possession in the cross-complainant at the time of the commencement of the suit. This is requisite in an original complaint for partition. *Wintermute v. Reese* (1882), 84 Ind. 308; *Brown v. Brown*

(1893), 133 Ind. 476; *Eve v. Louis* (1883), 91 Ind. 457. But a cross-complaint states a separate and independent cause of action, and if it appears from its averment that the right exists at the time of the filing it is sufficient. A right must appear at the time the party seeks to enforce it. *Anderson v. Wilson* (1885), 100 Ind. 402; *Meridith v. Lackey* (1860), 16 Ind. 1; *Fletcher v. Holmes* (1865), 25 Ind. 458. The proposition for which appellee contends, that a complaint for partition must disclose the right or title of the parties interested in quality and quantity, is sound, but the pleading before us substantially meets these requirements. It alleges that the plaintiffs and the defendants are the owners as tenants in common of the real estate, particularly described; that George Shetterly is the owner of an undivided one-eighteenth part of the lands described, as the surviving husband of Clara Axt Shetterly, deceased, named in the will of Clara Axt, deceased; that Clara Shetterly is the owner of an undivided two-eightieths part of said real estate; that each of the plaintiffs named in said complaint herein filed, to wit, Henry C. Axt, Lucy Mansfield, Henrietta Wood, Catharine Davis and Earl Vandevere, is the owner of an undivided one-sixth part of said real estate. Under an averment of ownership proof may be made of either legal or equitable title; for it is the right that is put in issue, not the evidence of the right. The averment implies the right of possession; that the parties named are the owners as tenants in common; and in effect alleges that they are the owners and in possession. Tenants in common hold by unity of possession. The rule which counsel for appellee invokes, that specific averments will control general averments in a pleading, will not be questioned. The general averment in the cross-complaint is ownership as tenants in common. The specific averments relate to the will of Christian Axt, deceased, which is made a part of the cross-complaint as an exhibit. As stated in the original opinion, it is not the foundation of the cross-

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complaint, and can not be looked to to determine the sufficiency of the pleading. The general averment therefore controls. The cross-complaint avers facts upon which evidence is admissible to determine the interests of the parties and upon which the cross-complainants are entitled to a hearing.

Petition for rehearing overruled.

GUY v. THE STATE.

[No. 6,014. Filed May 10, 1906.]

1. **INDICTMENT AND INFORMATION.**—*Indorsements.*—*Grand Jury.*—*Number Voting for Presentment.*—*Evidence.*—The return, into open court, by the grand jury, of an indictment indorsed “a true bill” and signed by the foreman is sufficient evidence that at least five of the grand jurors voted for the return of such indictment, that being the number required by law for the return of a valid indictment. p. 693.
2. **SAME.**—*Assault and Battery with Intent to Murder.*—*Present Ability.*—An indictment for assault and battery with intent to commit murder does not need to charge that defendant had the present ability to commit the assault. p. 693.
3. **EVIDENCE.**—*Prosecuting Witness's Communicated Threats.*—*Defense.*—Withdrawing evidence of certain communicated threats, made by the prosecuting witness against defendant, in a prosecution for assault and battery with intent to commit murder, is not reversible where the evidence showed that the defendant was in no imminent peril, that the prosecuting witness made no attack, and there was other evidence of threats remaining in the case, and where the question of intent was found in defendant's favor. p. 693.
4. **TRIAL.**—*Criminal Law.*—*Instructions.*—*Intent.*—In a prosecution for assault and battery with intent to commit murder, where defendant was acquitted of such intent, it is unnecessary to consider instructions solely on such question. p. 696.
5. **SAME.**—*Criminal Law.*—*Instructions.*—It is not erroneous to charge the jury in a criminal case that if they find all of the essentials of the crime charged proved beyond a reasonable doubt they should find defendant guilty. p. 696.
6. **ASSAULT.**—*Threats.*—*Abuse.*—*Justification.*—Threats and abuse are no justification for an assault. p. 696.

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7. **APPEAL AND ERROR.**—*Instructions.*—*Criminal Law.*—*Statutes.*—The civil procedure act of 1903 (Acts 1903, p. 338) has no application to criminal procedure. p. 696.
8. **TRIAL.**—*Instructions.*—*Criminal Law.*—Under subdivision six, §260 of the act of 1905 (Acts 1905, p. 641) all special instructions in a criminal case shall be in writing without oral modifications or explanations. p. 696.

From Jasper Circuit Court; *Ralph W. Marshall*, Special Judge.

Prosecution by the State of Indiana against Jasper Guy. From a judgment of conviction, defendant appeals. *Affirmed.*

Foltz & Spittler and *Baughman & Williams*, for appellant.

Charles W. Miller, Attorney-General, *C. C. Hadley*, *William C. Geake* and *Henry M. Dowling*, for the State.

ROBINSON, J.—Upon an indictment charging appellant with assault and battery with intent to commit murder, appellant was tried, found guilty of assault and battery and fined.

The indictment charges that "Jasper Guy, late of said county, on May 6, 1905, at said county and State aforesaid, did then and there feloniously, purposely and with premeditated malice, in a rude, insolent and angry manner unlawfully touch, bruise, lacerate, and wound the body and person of William Kenyon, by then and there feloniously, purposely and with premeditated shooting off and discharging at and against the body and person of said William Kenyon a certain revolver, then and there loaded with gunpowder and leaden shot, with the intent then and there and thereby feloniously and with premeditated malice to kill and murder the said William Kenyon, contrary to the form of the statute in such cases made and provided against the peace and dignity of the State of Indiana."

The indictment is indorsed: "A true bill. Alfred S. Barlow, foreman." The statute requires that "at least five

of the grand jurors must concur in the finding of
1. an indictment." It appears that the indictment was returned into open court and that it was duly indorsed by the foreman. This is sufficient evidence that the charge was made upon evidence given before the grand jury and that a sufficient number of jurors concurred in the finding. *Creek v. State* (1865), 24 Ind. 151; *Gillett, Crim. Law* (2d ed.), §118. See *Stewart v. State* (1865), 24 Ind. 142.

Further objection is made to the indictment that it does not aver that appellant had the present ability to commit the assault. Appellant is not charged with a mere

2. assault with intent to commit a felony. If such were the charge it would be necessary to aver the present ability to commit the injury, as such language is necessary to describe an assault. *Chandler v. State* (1895), 141 Ind. 106; *Adell v. State* (1870), 34 Ind. 543. But the charge in the indictment is an assault and battery with the intent to commit a felony. As the assault and battery is well charged it was not necessary to aver that appellant had the present ability to commit the injury. *Vaughan v. State* (1891), 128 Ind. 14.

Complaint is made of the action of the court in striking out certain testimony concerning threats made by the prosecuting witness, which were not communicated to the

3. appellant prior to the commission of the offense.

Appellant, in his testimony, gives a lengthy account of the occurrence, the substance of the material part of which seems to be, that on the day of the shooting appellant was on his way home and saw the prosecuting witness on the opposite side of the street. For a moment he lost sight of him, but on looking up he found the prosecuting witness, Kenyon, had crossed the street and was coming in his direction. He asked Kenyon, "Are you coming to beat me?" and he answered, "Yes." Appellant said, "Stop," and Kenyon did not do it. Appellant had a revolver in his

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pocket, and, believing Kenyon was going to carry out the threat to beat appellant, drew the gun up and fired to the right of Kenyon, thinking it would make him stop. Kenyon came within eight or ten feet of him, and he fired two or three more shots in rapid succession. Kenyon, while coming towards him, had his arms reached out toward him. Kenyon jumped off of the walk and said, "Nobody is scared at that gun," and "faced up as though he was going to start again." Appellant "backed off a little," put the gun away, and went on home. Kenyon was "possibly twelve or fourteen feet, maybe fifteen feet," away when appellant fired the first shot. Appellant's sole object in shooting at Kenyon "was to scare him, to keep me from a beating, in my sickly condition. I was not in a position to take a beating." Appellant also testified that different persons had told him prior to the shooting that Kenyon was threatening to give him a beating. Kenyon testified that he crossed the street and walked towards appellant with his hands in his pockets, that before anything was said by either of them, and when within about fifteen feet of each other, appellant began shooting, and that four or five shots were fired, three of which struck the witness. The evidence also shows that Kenyon had no weapon in his hands, and none on his person, that no violent language was used by him toward appellant, indicating an intention to take his life, or to inflict great bodily injury.

Giving appellant the benefit of the most favorable construction of his own testimony that can be given it, there is no proof of any overt act of attack upon him by Kenyon. There is no proof that appellant was in any imminent danger of losing his life or of suffering great bodily injury. From his own testimony he could not at that time have thought he was in any immediate danger, as he says his sole object in shooting "was to scare him, to keep me from a beating."

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In *Ellis v. State* (1899), 152 Ind. 326, the court said: "It is true that, in a case of homicide, previous threats by the deceased are admissible, especially if they have been communicated to the defendant before the homicide. *Wood v. State* [1883], 92 Ind. 269. To the same effect is *Leverich v. State* [1886], 105 Ind. 277. But there was no proof that such statement had been so communicated to the defendant before the homicide. Some courts hold threats are admissible without having been previously communicated to the defendant. Conceding, however, without deciding, that the offered evidence amounted to a threat against the defendant, we think it was immaterial, and therefore inadmissible. The evidence fails to show an attack on the defendant by the deceased."

In Wharton, Crim. Ev. (9th ed.), §757, it is said: "For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and if so with what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence. And so it has been frequently held. They are, however, inadmissible, unless proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger." *Leverich v. State*, *supra*.

In the case at bar, the evidence fails to show that the prosecuting witness made any attack on the appellant, or that he was in any imminent danger of great bodily harm. Moreover, testimony of threats made direct to appellant, and of threats made to others and communicated to appellant, were introduced, and as this offered evidence was only corroborative and went largely to the question of appellant's intent, which the jury found in his favor, we can not say that the action of the court in not admitting it was reversible error.

Complaint is made of the following instruction given by the court: "You can not find the defendant in this case

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guilty of assault and battery with intent, until each

4. and every one of you is satisfied from the evidence, beyond a reasonable doubt, of said guilt. In deciding the question, if there was an intent on the part of the defendant, it is your duty and privilege to consider all of the evidence as disclosed by the testimony, whether the prosecuting witness had any weapon, whether any threats were made by the prosecuting witness at the time of the alleged assault, whether the defendant himself, if you are satisfied from the evidence, had reason to fear he was to be assaulted, could have retreated or called assistance to his help, it is your privilege to consider all of the testimony and circumstances detailed by the witnesses in determining this question of intent." This instruction goes wholly to the question of intent. It is unnecessary to inquire whether the instruction is erroneous as against appellant, for the reason that upon the question of intent the jury found in appellant's favor.

It is not error for the court to instruct the jury that if they believe that all the essentials of the crime

5. charged have been proved beyond a reasonable doubt, they should find the defendant guilty.

Threats and abusive language alone, even when

6. made to the person threatened, will not justify an assault. *Martin v. State* (1892), 5 Ind. App. 453.

An examination of the refused instructions discloses that the subject-matter of these instructions was fairly covered by the instructions given. Certain instructions re-

7. quested were modified, and, as modified, were given.

The provision of the act of 1903 (Acts 1903, p. 338, §1, §544a Burns 1905), concerning the modification of instructions requested, has no application, the title of that act being: "An act concerning proceedings in civil procedure." Section 1901 Burns 1905, cl. 6, Acts 1905,

8. pp. 584, 641, §260, provides that if special instructions are given they shall be in writing, and such

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instructions, when so written and given by the court, shall in no case be orally qualified, modified or in any manner orally explained to the jury by the court. The record does not disclose that there was any oral modification of any written instruction requested by appellant.

Judgment affirmed.

**COULTER ET AL., EXECUTORS, v. BRADLEY,
ADMINISTRATRIX.**

[No. 4,708. Filed May 20, 1904.]

1. **APPEAL AND ERROR.—Complaint.—Defective.—Initial Attack on Appeal.—Special Findings.—Exceptions.—Waiver.**—Where an essential fact is omitted from a complaint to which no demurrer was filed, and the special findings set out such omitted fact, an exception to the conclusions of law on such findings should be held to be a waiver of the right to make an initial attack on appeal on the sufficiency of such complaint, because of such omitted fact. p. 698.
2. **COURTS.—Duty.—Furtherance of Justice.**—It is the duty of courts to exercise their authority in such way that justice will be subserved, and wrong prevented. p. 701.
3. **APPEAL AND ERROR.—Erroneous Ruling Precedent.—Transfer.**—Where a ruling precedent of the Supreme Court is deemed erroneous, the Appellate Court will transfer the case in hearing to that court with its reasons therefor. Henley, J., dissents. p. 702.

From Clinton Circuit Court; *John F. Neal*, Special Judge.

Action by Anna Bradley, as special administratrix of the estate of Frank Bradley, deceased, against David A. Coulter and another, as executors of the will of Hiram A. Bradley, deceased. From a judgment for plaintiff, defendants appeal. *Transferred to Supreme Court.* (For decision of Supreme Court on transfer, see 163 Ind. 311.)

Harry C. Sheridan and *Guenther & Clark*, for appellants.

W. R. Moore and *E. D. Salsbury*, for appellee.

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BLACK, J.—On the original hearing of this cause we inadvertently failed to take notice of a comparatively recent decision of the Supreme Court. *Goodwine v. Cad-*

1. *wallader* (1902), 158 Ind. 202. In that case, a fact which was held to constitute an essential element of the cause of action was not averred in the complaint, and it was decided that the complaint might be questioned successfully for the first time on appeal, because of this omission. There was a special finding of facts and conclusions of law stated thereon, and it was contended that the defect in the complaint was not available on appeal. The court discussed the question as to the proper effect to be given to the special findings in a case where the trial court has overruled a demurrer to an insufficient paragraph of complaint or answer, making reference to *Smith v. Wells Mfg. Co.* (1897), 148 Ind. 333, where the overruling of a demurrer to the second paragraph of answer was held to be harmless, if erroneous, because it was observed that the special findings followed the facts alleged in the third paragraph of answer, and a correct statement of the law might be made upon the facts pleaded in the second paragraph of answer, as they were found in the special findings.

Referring to *Smith v. Wells Mfg. Co.*, *supra*, it was said, that the record in that case showed affirmatively that the error, if any, in overruling the demurrer to the second paragraph of answer was harmless, and that in such case the Supreme Court will not consider the sufficiency of such paragraph. The second paragraph of answer in that case did not merely omit an essential ingredient in an otherwise sufficient defense pleaded, but was based upon what, in that and other cases in the same court, was held to be a false theory of the law.

In the case of *Martin v. Cauble* (1880), 72 Ind. 67, also cited in *Goodwine v. Cadwallader*, *supra*, the action of the court in overruling a demurrer to the first paragraph of the

complaint was held to be immaterial upon an examination of the special findings.

It is said in *Goodwine v. Cadwallader, supra*: "If an averment essential to the sufficiency of a pleading is omitted therefrom, and the special finding finds said omitted averment, which, if it had been contained in the pleading, would have rendered the same sufficient, this will not supply the allegation omitted, or otherwise cure the defect in the complaint, for the reason that such a finding is outside the issues, and must be disregarded. *Cleveland, etc., R. Co. v. Parker* [1900], 154 Ind. 153; *Louisville, etc., R. Co. v. Bates* [1897], 146 Ind. 564, 570, 571; *Fisher v. Louisville, etc., R. Co.* [1897], 146 Ind. 558, 561, and cases cited; *Citizens Nat. Bank v. Judy* [1896], 146 Ind. 322, 349; *Willis v. Crowder* [1893], 134 Ind. 515, 518; *Burton v. Morrow* [1892], 133 Ind. 221, 226."

In *Burton v. Morrow, supra*, there was not involved any question as to the sufficiency of any pleading, either on demurrer or after verdict. The remark, on page 226, that "if the special findings embrace findings upon matters not proper or competent to be considered by the court, or of facts which could only be established by considering incompetent evidence, such portion of the findings should be disregarded, and can not legitimately form a basis for a conclusion of law," was made with reference to facts which could only be established by evidence contradicting or varying by parol the terms of a written contract complete in itself. Such facts could not be considered under any form of pleading. The court determined that the record before it did not present such a case, and that the evidence in question was properly admitted, and the facts which it established were properly considered by the court and were properly embodied in the special findings.

In *Willis v. Crowder, supra*, there was no question upon any pleading. The finding which it was held should be disregarded was said to be the statement of a fact "not

within any proper issue." It was a fact of no potency under any form of pleading.

Citizens Nat. Bank v. Judy, supra, is distinguishable. A conclusion of law declared the right of a cross-complainant to reformation of his mortgage, so as to cover certain land as to which he made no claim in his pleading, and as to which there was no issue. A portion of land to which the special findings related, the subject-matter, was not involved in the suit for reformation. The sufficiency of the complaint was not questioned, because matter so included in the special findings was not covered by the pleading.

In *Fisher v. Louisville, etc., R. Co., supra*, there does not appear to have been any material matter lacking in the complaint. The judgment was affirmed because the special verdict did not show facts enough to uphold the complaint.

In *Louisville, etc., R. Co. v. Bates, supra*, there was no question as to the curing of defects in the complaint, the action of the trial court in overruling the demurrer thereto being approved on appeal.

In *Cleveland, etc., R. Co. v. Parker, supra*, a demurrer to the complaint for want of sufficient facts was overruled by the trial court. A material fact was not alleged in the complaint, and for this reason the judgment was reversed, with direction to sustain the demurrer.

In *Brumbaugh v. Richcreek* (1891), 127 Ind. 240, 22 Am. St. 649, also cited in *Goodwine v. Cadwallader, supra*, the question was upon the action of the court in overruling a demurrer to the complaint; and in *American Ins. Co. v. Replogle* (1888), 114 Ind. 1, 7, the rule approved was that the sufficiency of a paragraph of pleading, when demurred to, must be determined upon the facts stated therein, and not upon matters elsewhere appearing in the record.

In *Smith v. Smith* (1886), 106 Ind. 43, a case mentioned in *Goodwine v. Cadwallader, supra*, the court had occasion to distinguish between an assignment that the court below erred in overruling the demurrer to the com-

plaint, and an assignment that the complaint does not state facts sufficient to constitute a cause of action, and said of the latter: "Of course, such assignment of error questions the sufficiency of the complaint, after verdict and judgment thereon, with all the curative virtues and all the presumptions indulged in their favor and support, for the first time in this court."

In *Runner v. Scott* (1898), 150 Ind. 441, 443, also referred to in *Goodwine v. Cadwallader, supra*, it was said that a party by excepting to the conclusions of law might, perhaps, be held to have waived any error in the finding consisting of the statement therein of a fact not within the issues, by admitting that the facts had been correctly found, "which waiver would include, of course, an admission that the facts found were within the issues."

If special findings may be allowed to show on appeal that errors in rulings on pleadings were harmless, we can see no sufficient reason why the want of an allegation of a fact constituting an ingredient in the cause of action, otherwise sufficiently shown in a complaint, to the omission of which the court's attention has not been directed, may not properly be regarded as waived by a defendant who has excepted to the conclusions of law in a special finding containing a statement of such fact, and who attacks the complaint for the first time upon appeal. Not only does this seem to be reasonable and conducive to the fair administration of justice, but such a rule seems to be required by the statutes.

It is the spirit of the law that courts will exercise such authority as will promote the cause of justice and prevent wrong. *Buchanan v. Milligan* (1886), 108 Ind.

2. 433, 435. Our failure on the original hearing to take notice of the case of *Goodwine v. Cadwallader, supra*, was not in any way chargeable to the learned counsel for the appellant, who, as our rules permit, had cited it as an additional authority after the time for filing briefs had expired. This memorandum, being one of a number of

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such papers filed by both parties, escaped the attention of the writer of the opinion, who also failed to discover the case in his investigation. After further examination, we are convinced that the conclusion reached in our original opinion is supported by reason and the weight of authority, and is in agreement with the purpose of the legislature.

For the reasons herein expressed, and upon the grounds shown in our original opinion, we will grant a rehearing, and, under the provision of §1337j Burns 1901, cl.

3. 1, Acts 1901, p. 565, §10, will transfer the cause to the Supreme Court for its further consideration of the question of practice involved.

It is accordingly so ordered. Henley, C. J., concurs in the granting of a rehearing, but as to the order transferring the cause, dissents.

CHICAGO & SOUTHEASTERN RAILWAY COMPANY
ET AL. v. GRANTHAM.

[No. 4,883. Filed December 15, 1905.]

From Clinton Circuit Court; *James V. Kent*, Judge.

Action by James F. Grantham against the Chicago & Southeastern Railway Company and others. From a judgment for plaintiff, defendants appeal. *Affirmed*.

U. C. Stover and *A. C. Harris*, for appellants.

T. E. Ballard and *Clodfelter & Fine*, for appellee.

PER CURIAM.—The matters involved in this cause are substantially like those decided by the Supreme Court in *Chicago, etc., R. Co. v. Grantham* (1905), 165 Ind. 279, and upon the authority of that decision the appeal of the appellant Theodore P. Davis, trustee, is dismissed, and the judgment is affirmed.

COVALT ET AL., ADMINISTRATORS, v. DIAMOND
PLATE GLASS COMPANY ET AL.

[No. 5,468. Filed January 4, 1906.]

From Grant Superior Court; *B. F. Harness*, Judge.

Action by William B. Covalt and another, administrators of the estate of Abram J. Covalt, deceased, against the Diamond Plate Glass Company and others. From a judgment for defendants, plaintiffs appeal. *Affirmed*.

Logansport, etc., Gas Co. v. Null—37 Ind. App. 703.

B. C. Moon, for appellants.

Blacklidge, Shirley & Wolf, for appellee.

PER CURIAM.—The questions presented in this appeal were considered in the case of *Hancock v. Diamond Plate Glass Co.* (1906), ante, 351, and upon the authority of that case the judgment is affirmed.

WARE v. DIAMOND PLATE GLASS COMPANY ET AL.

[No. 5,469. Filed January 4, 1906.]

From Grant Superior Court; *B. F. Harness*, Judge.

Action by Christopher M. Ware against the Diamond Plate Glass Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

B. C. Moon, for appellant.

Blacklidge, Shirley & Wolf, for appellees.

PER CURIAM.—The questions presented by the record in this case were considered in the case of *Hancock v. Diamond Plate Glass Co.* (1906), ante, 351, and upon the authority of that case the judgment is affirmed.

LOGANSPORT & WABASH VALLEY GAS COMPANY v. NULL.

[No. 5,477. Filed January 26, 1906.]

From Grant Circuit Court; *H. J. Paulus*, Judge.

Suit by Mary E. Null against the Logansport & Wabash Valley Gas Company. From a decree for plaintiff, defendant appeals. *Affirmed.*

Blacklidge, Shirley & Wolf, for appellant.

Strange & Charles, for appellee.

BLACK, P. J.—This was a suit brought by the appellee to quiet her title to certain real estate. The question involved is like that decided in *Logansport, etc., Gas Co. v. Null* (1905), 36 Ind. App. 503, and upon the authority of that case the judgment herein is affirmed.

Swing v. Evansville Ice., etc., Co.—37 Ind. App. 704.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. SIMPSON.

[No. 5,556. Filed February 2, 1906.]

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Edward Simpson against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff for \$1,200, defendant appeals. *Reversed*.

George E. Ross, for appellant.*Nelson, Myers & Yarlott and Bailey & Cole*, for appellee.

PER CURIAM.—Appellee confesses error in the record and proceedings in the above entitled cause and asks that the judgment appealed from be reversed. On this confession of error the judgment of the trial court is reversed and a new trial ordered.

SWING, TRUSTEE, v. EVANSVILLE ICE & COLD
STORAGE COMPANY ET AL.

[No. 5,575. Filed March 6, 1906.]

From Superior Court of Vanderburgh County; *John H. Foster*, Judge.

Action by James B. Swing, trustee for the creditors of the Union Mutual Fire Insurance Company, against the Evansville Ice & Cold Storage Company and another. From a judgment for defendants, plaintiff appeals. *Reversed*.

Van Buskirk & Osborn and P. A. Reece, for appellant.*Gilchrist & DeBruler and J. D. Welman*, for appellees.

ROBY, C. J.—This is an action brought by appellant as trustee for the creditors of the Union Mutual Fire Insurance Company of Cincinnati against appellees, upon their liability as policy holders therein, for an assessment decreed by the supreme court of the State of Ohio for the payment of the unpaid losses of said company, incurred during the time appellees held their policies. The judgment herein depends upon the same propositions that are considered by the Supreme Court in *Swing v. Hill* (1905), 165 Ind. 411. Upon the authority of that case the judgment herein is reversed, and the cause remanded, with instructions to sustain appellant's motion for a new trial, and for further proceedings.

Curless v. Diamond Plate Glass Co.—37 Ind. App. 705.

NEW YORK, CHICAGO, & ST. LOUIS RAILROAD
COMPANY v. MARTIN.

[No. 5,490. Filed March 15, 1906.]

From Starke Circuit Court; *John C. Nye*, Judge.

Action by Stephen Martin against the New York, Chicago & St. Louis Railway Company. From a judgment for plaintiff for \$3,000, defendant appeals. *Reversed*.

Olds & Doughman and *John H. Clark*, for appellant.*Lairy & Mahoney* and *M. Winfield*, for appellee.

MYERS, J.—In this case the same questions are presented for decision as were involved in the case of *New York, etc., R. Co. v. Martin* (1905), 35 Ind. App. 669. The petition to transfer that case to the Supreme Court was denied. The petition rested upon the following reasons: (1) That a new question of law was involved and erroneously decided. (2) That the opinion of this division of the Appellate Court in that case contravened rulings precedent of the Supreme Court, as announced in *Terre Haute, etc., R. Co. v. Brunner* (1891), 128 Ind. 542, and *Cincinnati, etc., R. Co. v. Hiltzhauer* (1885), 99 Ind. 486. The ruling of the Supreme Court in denying the petition to transfer was in effect an approval of the opinion in that case, so far as it was challenged by the specific reasons assigned therein for transfer. *City of Huntington v. Lusch* (1904), 163 Ind. 266. By that petition the principal and controlling questions in this case were squarely presented to the Supreme Court, and its ruling thereon must be considered as authority in this case upon the questions so presented. Therefore, upon the authority of that case and the ruling of the Supreme Court on the petition to transfer, the judgment of the trial court in this cause is reversed, with instructions to sustain the demurrer to the complaint.

CURLESS v. DIAMOND PLATE GLASS COMPANY.

[No. 5,418. Filed March 16, 1906.]

From Grant Superior Court; *B. F. Harness*, Judge.

Suit by Marion Curless against the Diamond Plate Glass Company. From a decree for defendant, plaintiff appeals. *Affirmed*.

B. C. Moon, for appellant.*Blackledge, Shirley & Wolf*, for appellee.

Marion Trust Co. v. City of Indianapolis—37 Ind. App. 706.

ROBINSON, J.—Suit by appellant upon a gas lease to recover acreage rental. Upon a special finding of the facts the court found the law to be with appellee, and rendered judgment accordingly. The error assigned questions the correctness of the conclusion of law. The case is here on the second appeal. *Diamond Plate Glass Co. v. Curless* (1899), 22 Ind. App. 346.

There is nothing in the questions here sought to be reviewed to prevent the application of the general rule that the principles of law declared on the appeal of a case, so far as applicable, remain the law of the case on a subsequent appeal and must be followed whether right or wrong. The case is in all respects controlled by the principles of law announced in the case of *Hancock v. Diamond Plate Glass Co.* (1906), *ante*, 351, and upon the authority of that case the judgment is affirmed.

MARION TRUST COMPANY, TRUSTEE, v. CITY OF
INDIANAPOLIS ET AL.

[No. 5,411. Filed October 26, 1905. Rehearing denied February 14, 1906. Transfer denied May 8, 1906.]

From Superior Court of Marion County (66,695); *John L. McMaster*, Judge.

Suit by the Marion Trust Company, trustee, against the City of Indianapolis and others. From a decree for defendants, plaintiff appeals. *Affirmed*.

Wilson & Townley, for appellant.

Henry Warrum, E. B. Raub and Albert B. Cole, for appellees.

COMSTOCK, J.—The questions presented in this case are decided in *Marion Trust Co. v. City of Indianapolis* (1906), *ante*, 672, and upon the authority of that case the judgment is affirmed.

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[NOTE.—The citation *McNulty v. State*, 612, 614, (1) 615 (2), indicates that the initial page of the case is 612, that the pages on which the point is found are 614 and 615 and that the point cited begins at the marginal indentations numbered 1 and 2 respectively.]

ABATEMENT—

Plea in, does not lie in criminal case because the notary swearing affiant was engaged as an attorney in the prosecution and was not a *de jure* notary, see NOTARIES PUBLIC, 1, 2; *McNulty v. State*, 612, 615 (1), 616 (2).

ACKNOWLEDGMENT—

Meaning of, see WORDS AND PHRASES; *Townsend v. Meneley*, 127, 131 (4).

Of illegitimate child, what constitutes, see DESCENT AND DISTRIBUTION, 10; *Townsend v. Meneley*, 127, 132 (7).

ACTION—

See MALICIOUS PROSECUTION.

As to costs in, see COSTS, 1, 2; *Douglas v. Indianapolis, etc., Traction Co.*, 332.

For wrongfully refusing to honor ticket and ejecting passenger, sounds in tort, see PLEADING, 63; *Pittsburgh, etc., R. Co. v. Coll*, 232, 237 (3).

1. *Parties.* — *Drains.* — *Contractor's Bonds.* — *Statutes.*—Under §253 Burns 1901, §253 R. S. 1881, all actions on bonds payable to the State shall be brought on the relation of the parties interested, and this applies in favor of the assessed landowners as against a drainage contractor's bond.

State, ex rel., v. Karr, 120, 124 (3).

2. *Misjoinder.*—*Quieting Title.*—*Nuisance.*—A demurrer for misjoinder of causes should be sustained where one paragraph of a complaint is for quieting title and another is for damages caused by a nuisance, but error in overruling same is by statute not reversible (§344 Burns 1901, §341 R. S. 1881).

City of Huntington v. Stemen, 553, 554 (2).

3. *Cause Arising in Another State.*—*Procedure.*—*Negligence.*—In an action brought in Indiana on account of negligent injuries received in Ohio, the Indiana procedure governs.

Cincinnati, etc., St. R. Co. v. Klump, 660, 662 (3).

ADMISSIONS—

See EVIDENCE.

ADVERSE POSSESSION—

See QUIETING TITLE.

AGENCY—

See PRINCIPAL AND AGENT.

ALIENATION—

See HUSBAND AND WIFE; PLEADING, 1, 2; *Gregg v. Gregg*, 210.

Punitive damages recoverable in, see DAMAGES, 3; *Gregg v. Gregg*, 210, 217 (4).

ALIMONY—

See DIVORCE.

A question for the court, see DIVORCE, 1; *Watson v. Watson*, 548, 551 (1).

AMENDMENTS—

See PLEADING, 3-6.

Of indictments, see CRIMINAL LAW, 7; *State v. Clark*, 105.

ANSWER—

See PLEADING.

APPEAL AND ERROR—

Motion in arrest filed after amended complaint applies thereto, see JUDGMENT, 3; *Gregg v. Gregg*, 210, 217 (5).

From awards in eminent domain, effect of, see EMINENT DOMAIN, 2, 4; *Indianapolis, etc., Traction Co. v. Dunn*, 248, 250 (3), 251 (5).

Appellate Court will transfer cases involving questions of constitutional law to Supreme Court, see COURTS, 2; *Seelyville Coal, etc., Co. v. McGlosson*, 54.

1. *Answer.—Initial Attack on Appeal.*—An answer cannot be attacked for insufficiency of facts for the first time on appeal. *Unger v. Mellinger*, 639, 641 (1).

2. *Assignment of Errors.—Names.*—An assignment of errors entitled: "Henry Williams, Administrator of the Estate of Adam S. Dougherty, Deceased, Appellant, v. Mary J. Dougherty, Appellee," is sufficient, in the absence of a showing that there were other parties to the judgment.

Williams v. Dougherty, 449, 450 (1).

3. *Assignment of Errors.—Want of Prayer for Relief.*—The want of a prayer for relief is not fatal to an assignment of errors otherwise sufficient.

Williams v. Dougherty, 449, 451 (3).

4. *Parties.—Joint Assignment.*—Where no judgment was rendered either for or against two of the appellants, and the assignment of errors is joint, no question is presented on appeal.

Stemen v. Knudson-Mercer Co., 274.

5. *Assignment of Errors.—Weight of Evidence.—New Trial.*—A motion for a new trial on the ground of insufficient evidence sufficiently presents on appeal the question of the weight of the evidence.

Unger v. Mellinger, 639, 643 (5).

6. *Bill of Exceptions.—Entry of Filing.*—Where a record entry, after mentioning a bill of exceptions, states: "Which bill of exceptions is now tendered to the court and by the court signed and filed with the clerk of this court, said bill of exceptions being in these words," the filing of the bill is sufficiently shown.

Cameron v. State, 381, 382 (1).

7. *Order-Book.—Bill of Exceptions.—Conflict.—Which Controls.*—Where there is a conflict between the order-book and the bill

APPEAL AND ERROR—Continued.

of exceptions, as to whether a motion was joint or several, the bill controls.

Douglas v. Indianapolis, etc., Traction Co., 332, 336 (2).

8. *Record.—Bill of Exceptions.—Exhibits.*—Exhibits designated as attached to a bill of exceptions are a part of the record if they are attached to such bill preceding the authentication thereof by the judge.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 543 (4).

- 8½. *Bills of Exceptions.—Evidence.—Models.—Whether in Record.*—Where the bill of exceptions shows that a model of a railway switch and certain other appliances were used by the witnesses in their testimony, but such articles are not included in the bill of exceptions, such testimony will be considered in the record, certain photographs of such articles being included in the bill, from which the court can ascertain the meaning of such testimony. *Cleveland, etc., R. Co. v. Snow*, 646, 652 (4).

9. *Record.—Bill of Exceptions.—Exhibits.—Statutes.*—An exhibit which is already a part of the record can be made a part of the evidence in a bill of exceptions simply by reference, but if not a part of the record, it must be authenticated as a part of the bill by the judge, and it is not sufficient to attach it as an exhibit after the judge's signature, the act of 1903 (Acts 1903, p. 338) failing to provide for such cases.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 544 (5).

10. *Evidence Not All in Record.—Questions Presented.*—Where the evidence is not all in the record, all questions not affected by such omitted evidence may be considered on appeal.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 544 (6).

11. *Briefs.—Waiver.*—Alleged errors not discussed in appellant's brief are waived.

Unger v. Mellinger, 639, 643 (4).

Cincinnati, etc., St. R. Co. v. Klump, 660, 664 (6).

Indianapolis, etc., Transit Co. v. Reeder, 262, 263 (1).

12. *Evidence.—Recital of.—Briefs.*—Where appellant sets out in his brief simply the conclusions drawn from the evidence by counsel, no question is presented on the sufficiency of the evidence. *Baker v. Gowland*, 364, 370 (9).

13. *Appellate Court Rules.—“Condensed Recital of Evidence.”*—A brief containing seventy-six printed pages of the evidence, including much as originally given as well as arguments and objections of counsel interspersed, is not a “condensed recital of the evidence” as required by Appellate Court rule 22.

Cleveland, etc., R. Co. v. Snow, 646, 651 (3).

14. *Appellate Court Rules.—Briefs.*—Where appellants fail to set out the evidence or the substance thereof in their brief, no question depending thereon will be considered.

Baker v. Gowland, 364, 370 (8).

Hartzell v. Hartzell, 481, 485 (3).

15. *Briefs.—Failure to Cite Pages of Transcript.*—The failure of appellants in their brief to cite the pages of the transcript where the objectionable evidence may be found is a waiver of any questions thereon.

Tyler v. Davis, 557, 571 (14).

Baker v. Gowland, 364, 370 (8).

APPEAL AND ERROR—Continued.

16. *Appellate Court Rules.—Briefs.*—Where appellant fails to set out in his brief the instructions questioned, in terms or in substance, all questions thereon are waived.
McNulty v. State, 612, 616 (3).
17. *Appellate Court Rules.—Briefs.*—Where appellants set out the substance of the pleadings questioned there is a sufficient compliance with Appellate Court rule 22.
Hay v. Bash, 167, 169 (1).
18. *Appellate Court Rules.—Briefs.*—Where appellant's brief merely sets out the pages and lines of the transcript where the questioned complaint may be found without setting out such complaint in terms or substance, such appeal will be dismissed for failure to comply with Appellate Court rule 22. Robinson, J., concurs but votes for a modification of such rule.
Ledbetter v. Coggeshall, 124.
19. *Appellate Court Rules.—Briefs.*—A failure by appellant to set out in her brief the portions of the record questioned, together with her failure to set out propositions or points, as required by Appellate Court rule 22, is a waiver of such alleged errors.
Gregg v. Gregg, 210, 219 (9).
20. *Appellate Court Rules.—Briefs.*—Where appellant fails to set out literally or substantially the questioned complaint in his brief, and suggests no objection thereto, no question thereon is presented.
Baker v. Gowland, 364, 367 (2).
21. *Appellate Court Rules.—Briefs.*—Where appellant sets out in his brief a questioned second paragraph of answer and then the opening and closing statements of a questioned cross-complaint with the statement that the body thereof is the same as the answer set out, the Appellate Court rule, requiring appellant to set out in terms or substance the pleadings questioned, is sufficiently complied with.
Nichols & Shepard Co. v. Berning, 109, 113 (1).
22. *Appellate Court Rules.—Transcript.—Index.*—Where appellant made an index to his bill of exceptions but failed to index the other portions of his transcript, as required by Appellate Court rule three, the appeal will be dismissed.
McCormick, etc., Mach. Co. v. Hinchman, 83.
23. *Instructions.—Criminal Law.—Statutes.*—The civil procedure act of 1903 (Acts 1903, p. 338) has no application to criminal procedure.
Guy v. State, 691, 696 (7).
24. *Receivers.—Judgment.—Receiving Benefits of.—Dismissal of Appeal.—Attorney and Client.*—Where, pending a suit for a receiver, the tangible property of a corporation was sold for enough to pay the debts of such corporation, which sale the court refused to disturb, but appointed a receiver for the intangible assets thereof, who, after the petitioner had appealed, collected money and upon the request of petitioner's attorney paid such attorney for his services in prosecuting such cause, such appeal will be dismissed, such payment being a discharge of at least a part of petitioner's indebtedness to such attorney.
Thomson v. Midland Portland Cement Co., 459.
25. *Admission of Evidence.—Harmless Error.*—Where appellant admitted its liability and on appeal did not question the amount of recovery, alleged erroneous admission of evidence is harmless.
Indianapolis, etc., Transit Co. v. Reeder, 262, 263 (2).

APPEAL AND ERROR—Continued.

26. *Motion to Withdraw from Highway Petition.—Exceptions.*—Where certain signers of a highway petition moved to withdraw their names from such petition, but no action was taken thereon and no exception of any kind taken, no question is presented. *Baker v. Gowland*, 364, 366 (1).
27. *Highways.—Enclosures.—Judgment.—Form of.—How Questioned.*—No error is presented on appeal by assigning error on the form of a judgment which establishes a highway but says nothing of enclosures existing, a motion to modify such judgment being the proper practice. *Baker v. Gowland*, 364, 367 (4).
28. *Instructions.—Exceptions.—How Shown.*—Where an instruction in the record contained at its close the words: "Given and excepted to May 26, 1904, James M. Leathers, judge," and it is not shown by the record or bill of exceptions otherwise that any exception was reserved, no question thereon is saved. *Indiana, etc., R. Co. v. Bundy*, 152 Ind. 590, followed. *Fletcher v. Kelly*, 254, 262 (4).
29. *Instructions.—Record.—Statutes.*—To save questions on instructions under the act of 1903 (Acts 1903, p. 338), attorneys must comply substantially with the provisions thereof. *Baker v. Gowland*, 364, 368 (6).
- 29½. *Instructions.—Record.—Statutes.*—A filing with the clerk of the instructions in a cause twelve days after the verdict does not bring such instructions into the record by a bill of exceptions within the terms of the statute (§641i Burns 1905, Acts 1903, p. 338, §9). *Baker v. Gowland*, 364, 370 (7).
30. *Instructions.—How Made Part of Record.*—Instructions filed with the clerk and excepted to in writing are a part of the record. *Cincinnati, etc., St. R. Co. v. Stahle*, 539, 544 (7).
31. *Erroneous Instructions.—How Cured.*—An erroneous instruction is not cured by the giving of other instructions which are correct. *Cleveland, etc., R. Co. v. Snow*, 646, 654 (7).
32. *Inconsistent Instructions.—Misleading.*—The giving of inconsistent instructions, calculated to mislead the jury, is reversible error. *Cleveland, etc., R. Co. v. Snow*, 646, 655 (8).
33. *Death.—Judgment.*—Where appellee dies during the pendency of the appeal, a judgment of affirmance will be made as of date of submission. *American Quarries Co. v. Lay*, 386, 393 (9).
34. *Jurisdiction.—Amount Involved in Appeal.*—An action for the recovery of \$29.38 filed May 5, 1903, in which judgment for such amount was rendered March 9, 1904, cannot be appealed to the Supreme or Appellate Court, since the act of 1903 (Acts 1903, p. 280, §1337f Burns 1905) limits such appeals, with certain exceptions, to judgments exceeding \$50. *Yaakey v. Leich*, 393, 394 (1).
35. *Jurisdiction.—Raising Question.*—The Appellate Court will take notice of its lack of jurisdiction, and dismiss an appeal where its jurisdiction is wanting. *Yaakey v. Leich*, 393, 394 (2).
36. *Law of the Case.*—The law as declared on a former appeal is the law of the case, so far as applicable to the facts, through all subsequent stages. *Hancock v. Diamond Plate Glass Co.*, 351, 359 (1).

APPEAL AND ERROR—Continued.

37. *Law of the Case.—Dismissal.—New Action.*—Where the plaintiff, after a reversal by the Appellate Court, dismissed her action without prejudice, and afterwards filed an action for substantially the same cause, she is bound by such prior decision as the law of the case.
Hancock v. Diamond Plate Glass Co., 351, 361 (3).
38. *Law of the Case.—Pleadings.—Evidence.*—Where it appears by the evidence in the prior case that the new allegations in a subsequent case were considered in the prior case, a decision of the prior case on appeal is the law of the subsequent case.
Hancock v. Diamond Plate Glass Co., 351, 361 (4).
39. *Law of the Case.—Wrongful Decision.*—Although a prior decision of the case was wrong, it remains the law of the case through all subsequent stages.
Hancock v. Diamond Plate Glass Co., 351, 363 (7).
40. *Law of the Case.*—Where the Supreme Court has held a complaint good upon a prior appeal, its decision is the law of the case on subsequent appeals. *Zuelly v. Casper*, 186, 193 (8).
41. *Law of the Case.—Evidence.*—Where the evidence in a cause is held insufficient on a prior appeal, such decision is the law of the case on such evidence, but where additional evidence, which is not merely cumulative, is introduced on a subsequent trial such former decision is not the law of the case.
Fifer v. Rachels, 275, 277 (4).
42. *Presentation of Cause.—Record.—Exceptions.—Legislative Powers.*—The manner of the presentation of a cause on appeal is for the determination of the appellate court, but the manner of making the record and saving exceptions is for the legislature.
Baker v. Gowland, 364, 368 (5).
43. *Mortgages.—Foreclosure.—Partial Recovery.*—Where defendant married woman pleaded suretyship and coverture as against all of plaintiff's demand, the plaintiff has no cause for complaint because the court gave a decree for part only of plaintiff's demand, the proof showing that such defendant was liable only for such part.
Equitable Trust Co. v. Torphy, 220, 222 (2).
44. *New Trial.—Evidence Not in Record.*—Where the evidence is not brought into the record, questions raised by the motion for a new trial cannot be considered.
Grau v. Grau, 635, 639 (5).
45. *Interrogatories to Jury.—Reversal.—When New Trial Refused.*—Where the evidence and the answers to the interrogatories to the jury show that the plaintiff cannot recover, a judgment in his favor will be reversed with directions to render judgment for defendant on such answers.
Chicago, etc., R. Co. v. Bryan, 487, 491 (3).
46. *Rendering Final Judgment.*—Where a cause has been in litigation several years and the answers in the interrogatories to the jury and the general verdict outline the respective rights of the parties, and the result of another trial would probably not be different, the Appellate Court will render a final decree.
Catterson v. Hall, 341, 350 (7).
47. *Vacation Appeal.—Parties.*—Appellant, in a vacation appeal, must make all coparties parties to the appeal and name them in the assignment of errors.
Helberg v. Dovenmuehle, 377, 379 (1).

APPEAL AND ERROR—Continued.

48. *Vacation Appeal.—Service of Notice on Appellee's Attorney.—Sufficiency.*—Notice of a vacation appeal served upon appellee's attorney of record is sufficient unless appellant has received notice, prior to such service of notice, that such attorney has been discharged by appellee. *Rose v. Owen*, 125.
49. *Parties.—Death.—Failure to Make Representative a Party on Appeal.—Dismissal.*—Where judgment was taken September 14, 1904, and one of the appellees, a party defendant, died December 8, 1904, an appeal taken September 12, 1905, without making such decedent's representative a party will be dismissed. *Ehlers v. Hartman*, 617.
50. *Judgment.—Personal.—Appeal in Representative Capacity.*—Where the complaint in the caption names defendant in his personal capacity but in the body seeks to remove him from his representative capacity, and some other pleadings name him individually and some in a representative character, and the judgment removes him from his representative capacity, an appeal by him in his representative capacity is properly taken. *Williams v. Dougherty*, 449, 450 (2).
51. *Dismissal.—Parties.—Boards of Commissioners.—Taxpayers Resisting Claim against Board.*—Where an action was filed against the board of commissioners and certain taxpayers petitioned the judge to appoint an attorney in addition to the regular attorney to defend for the board, but such taxpayers did not themselves become parties to such action, such board has the right to dismiss an appeal taken by such appointed attorney, although such taxpayers joined in the assignment of errors, there being no judgment against any one but such board. *Board, etc., v. Wild*, 32.
52. *Pleadings.—Special Findings.—Same Questions Presented.*—Where the special findings show the same facts as stated in the pleadings, a decision on the special findings renders useless a decision on the pleadings. *Indiana Rolling Mill Co. v. Gas Supply, etc., Co.*, 154, 155 (1).
53. *Questioning Complaint for First Time on Appeal.*—A complaint is sufficient, when questioned for the first time on appeal, if the facts stated will bar another action for the same cause. *Embree v. Emerson*, 16, 21 (4).
54. *Sustaining Demurrer to Paragraph of Answer.—Facts Admissible under Another.*—It is harmless error to sustain a demurrer to a paragraph of answer whose facts are admissible under the general denial already filed. *Baggerly v. Lee*, 139, 146 (4).
55. *Overruling Demurrer to Paragraph of Answer.—Facts Provable under Another.*—The overruling of a demurrer to a paragraph of answer is not available error on appeal where the facts contained therein are provable under another paragraph which is not questioned. *Pollard v. Pittman*, 475, 479 (1).
56. *Precipe.—Part of Record.—Presumptions.*—Where appellant in his precipe called for only that part of the record which affected one of several defendants, there is no presumption that such others were not properly before the court and affected by the proceedings. *Helberg v. Dovenmuehle*, 377, 380 (2).
57. *Right Result.*—Where the trial court reached the right result, its decision will be affirmed. *Posey County Fire Assn. v. Hogan*, 573, 582 (10). *Equitable Trust Co. v. Torphy*, 220, 223 (3).

APPEAL AND ERROR—Continued.

58. *Right Result.*—Overruling a demurrer to a paragraph of answer is not reversible error where, under the facts established under another paragraph, plaintiff was not entitled to recover.
Pollard v. Pittman, 475, 479 (2).
59. *Right Result.*—*Bills and Notes.*—*Defective Answer.*—*Special Findings.*—Where plaintiff secured a judgment against one of the joint makers of a note for the whole amount due as shown in the special findings, alleged error in the court's ruling on such defendant's answer is harmless.
Equitable Trust Co. v. Torphy, 220, 222 (1).
60. *Summons.*—*Return.*—*Motion to Quash.*—*Who Can Take Advantage of.*—The overruling of a motion to quash the return of the sheriff to the summons, by a party upon special appearance, cannot be questioned on appeal by other parties who failed to question the service upon them.
Tyler v. Davis, 557, 566 (2).
61. *Appellate Court.*—*Jurisdiction.*—*Transfer.*—The Appellate Court has no jurisdiction to determine a mandamus case, and such a cause will be transferred to the Supreme Court.
Funk v. State, ex rel., 231.
62. *Erroneous Ruling Precedent.*—*Transfer.*—Where the Appellate Court deems a ruling precedent erroneous, it will transfer the cause to the Supreme Court.
New Castle Bridge Co. v. Doty, 84, 89 (6).
Coulter v. Bradley, 697, 702 (3).
63. *Assignment of Errors.*—*Motion to Dismiss Appeal.*—*Waiver.*—Where the error assigned is, that the trial court erred in sustaining defendants' demurrer and rendering judgment, no question is presented; and the fact that an appellee failed to move to dismiss such appeal until after the expiration of the time for filing its brief is not a waiver of its right to a dismissal.
Hayes v. Locust, 104.
64. *Complaint.*—*Defective.*—*Initial Attack on Appeal.*—*Special Findings.*—*Exceptions.*—*Waiver.*—Where an essential fact is omitted from a complaint to which no demurrer was filed, and the special findings set out such omitted fact, an exception to the conclusions of law on such findings should be held to be a waiver of the right to make an initial attack on appeal on the sufficiency of such complaint, because of such omitted fact.
Coulter v. Bradley, 697, 698 (1).
65. *Weighing Evidence.*—The Appellate Court will not weigh conflicting oral evidence.
Case v. Collins, 491, 506 (6).
Nichols & Shepard Co. v. Berning, 109, 116 (7).
Maitland v. Reed, 469, 474 (3).
Tyler v. Davis, 557, 571 (13).
66. *Weighing Evidence.*—*Master and Servant.*—*Negligence.*—*Question for Jury.*—Where the evidence is conflicting, in an action by the servant against his master for damages caused by such servant's attempting to tilt a large bottle of acid so that a truck could be placed under it and while tilting it the defective cleat broke, causing the bottle to fall and the acid to splash, some of it striking him in the face and eyes and causing injuries, the question of negligence is for the jury and its verdict will not be disturbed on appeal.
Columbian, etc., Stamping Co. v. Burke, 518, 523 (6).

APPEAL AND ERROR—Continued.

67. *Negligence.—Inferences.—Weighing Evidence.*—Where there is some evidence from which a jury could draw an inference of defendant's negligence, a verdict for plaintiff will not be disturbed on appeal.

Southern Ind. R. Co. v. Baker, 405, 411 (5).

68. *Elevators.—Contributory Negligence.—Weighing Evidence.*—Where there is evidence from which the jury could find that plaintiff was not guilty of contributory negligence in stepping into an elevator shaft, thereby receiving injuries, a verdict for plaintiff will not be disturbed on appeal. *Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607, held inapplicable.

Fletcher v. Kelly, 254, 260 (2).

69. *Elevators.—Negligence.—Weighing Evidence.*—Where there is some evidence that defendant was negligent in the maintenance of an elevator in which plaintiff was injured, the decision of the trial court will not be disturbed.

Fletcher v. Kelly, 254, 260 (1).

APPEARANCE—

See PROCESS.

APPELLATE COURT—

See COURTS.

ARBITRATION—

Provision in a building contract making architect's decision final is void, see CONTRACTS, 2; *Maitland v. Reed*, 469, 470 (1).

ARGUMENT OF COUNSEL—

See TRIAL, 1-3.

ASSAULT—

Threats.—Abuse.—Justification.—Threats and abuse are no justification for an assault. *Guy v. State*, 691, 696 (6).

ASSAULT AND BATTERY—

Indictment for, with intent to murder, see INDICTMENT AND INFORMATION, 2; *Guy v. State*, 691, 693 (2).

ASSIGNMENT FOR BENEFIT OF CREDITORS—

Husband and Wife.—Preferences.—The husband may prefer his wife in an assignment for the benefit of his creditors, where she agrees to release his antenuptial contract to pay her \$10,000 out of his estate as her share thereof as surviving widow, in consideration of a certain sum which is not grossly unjust to his creditors. *Clow v. Brown*, 172, 186 (6).

ASSOCIATIONS—

Have right to require disputes as to rights of members to be submitted to officers thereof, see CONTRACTS, 1; *Maitland v. Reed*, 469, 472 (2).

ASSUMPTION OF RISK—

See MASTER AND SERVANT.

ATTACHMENT—

Judgment may be rendered against garnishee, though writ of attachment not served on principal debtor's goods, see CARRIERS, 5; *Malott v. Johnson*, 678, 686 (5).

ATTORNEY AND CLIENT—

Misconduct in argument of counsel, see TRIAL, 1-3.

Stipulation in note for attorneys' fees is contract of indemnity, recoverable only when defendant has violated the conditions of such note, see BILLS AND NOTES, 1; *St. Joseph County Sav. Bank v. Randall*, 402, 405 (3).

Attorney, who is a notary, may administer oath to client, see NOTARIES PUBLIC, 2; *McNulty v. State*, 612, 616 (2).

May discuss interrogatories to the jury, see TRIAL, 49; *Clear Creek Stone Co. v. Carmichael*, 413, 419 (6).

Service of notice on attorney good in vacation appeal unless appellant knows of such attorney's discharge, see APPEAL AND ERROR, 48; *Rose v. Owen*, 125.

A payment to petitioner's attorney by the receiver appointed pursuant to the prayer of plaintiff's petition, is a discharge *pro tanto* of such petitioner's liability to such attorney, see APPEAL AND ERROR, 24; *Thomson v. Midland Portland Cement Co.*, 459.

Deceit.—Collusion.—Statutes.—An attorney is liable to his client under §984 Burns 1901, §972 R. S. 1881, for deceit or collusion causing injury to such client.

Whitesell v. Study, 429, 435 (7).

AUDITING BOARD—

Powers of, in auditing orders, see TOWNSHIPS, 2; *Indiana Trust Co. v. Jefferson Tp.*, 424, 429 (2).

AWARDS—

See EMINENT DOMAIN.

BANKS AND BANKING—

See BILLS AND NOTES.

BASEBALL—

See CRIMINAL LAW.

BASTARDY—

See CHILDREN; DESCENT AND DISTRIBUTION.

BILL OF EXCEPTIONS—

See APPEAL AND ERROR.

BILLS AND NOTES—

As to pleadings in cases of, see PLEADING, 18-20.

Burden remains on plaintiff where *non est factum* is pleaded, see TRIAL, 4; *Godman v. Henby*, 1, 2 (1).

Evidence justifying ownership of, see EVIDENCE, 5; *Embree v. Emerson*, 16, 22 (7).

No presumption that note was payable in bank, see EVIDENCE, 20; *Embree v. Emerson*, 16, 25 (8).

Where sureties on, pay equal amounts, no right of contribution exists, see CONTRIBUTION; *Pollard v. Pittman*, 475, 479 (3).

Time of listing for taxation, see TAXATION, 2; *Corr v. Martin*, 655, 659 (5).

1. *Attorneys' Fees.*—A stipulation in a note for attorneys' fees constitutes a contract of indemnity which is enforceable only when the maker commits a breach of the provisions of such note. *St. Joseph County Sav. Bank v. Randall*, 402, 405 (3).

BILLS AND NOTES—Continued.

2. *Attorneys' Fees.—Decedents' Estates.*—A note, stipulating that the maker shall pay attorneys' fees, filed before maturity as a claim against the decedent's estate and properly allowed by the administrators, does not render such estate liable for attorneys' fees in the presentation of such claim.
St. Joseph County Sav. Bank v. Randall, 402, 405 (4).
3. *Checks.—Title.—Unauthorized Indorsement.*—The unauthorized indorsement of a bank check confers no title on the indorsee.
Hamilton Nat. Bank v. Nye, 464, 466 (3).
4. *Checks.—Title.—Unauthorized Indorsement.—Subsequent Indorsees.*—Subsequent indorsees have no title as against the drawer of a check, where the first indorsement was unauthorized.
Hamilton Nat. Bank v. Nye, 464, 466 (4).
5. *Checks.—Unauthorized Indorsement.—Innocent Indorsees.—Loss.*—The drawer of a check does not put it in the power of a third party to do a wrong, within the meaning of the law, when he draws a check to the payee and such third party without authority indorses the payee's name thereon and such check passes in due course to a subsequent indorsee.
Hamilton Nat. Bank v. Nye, 464, 468 (7).
6. *Extension.—Consideration.—Subsequent Payment of Interest.*—The subsequent payment of the interest due upon a note constitutes no consideration for a prior contract, executed without consideration, to extend the time of payment of such note.
Weaver v. Prebster, 582, 585 (4).
7. *Sureties.—Payment.—New Notes.—Consideration.*—Where three sureties, at different times, paid equal amounts on their principal's note, each taking the principal's note with his co-sureties on the original note as sureties on such new note, there was no consideration for such new notes, their legal effect being to evidence such payments.
Pollard v. Pittman, 475, 480 (4).
8. *Sureties.—Contribution.—Refusal of One to Assist in Recovering.*—Where three sureties on a note pay equal amounts thereon, taking an indemnifying mortgage from their principal, and they subsequently agree to enforce such mortgage, and in a suit in the trial court they are only partially successful, and one of them refuses to appeal, such one cannot claim contribution where the others successfully appeal such case and receive their indemnity.
Pollard v. Pittman, 475, 480 (5).
9. *Delivery.—Evidence.*—Where the evidence shows that the maker of a negotiable note signed such note and acknowledged the execution of a chattel mortgage securing same before a notary; that she returned to her home and locked same in her drawer; that the payee, without her knowledge or consent, unlocked such drawer and took same and refused upon her demand to return same, no delivery is shown.
Godman v. Henby, 1, 3 (4).
10. *Execution.*—The execution of a note includes a signing of such note and a delivery to the payee with intent to transfer title and an acceptance by the payee with intent to receive title.
Godman v. Henby, 1, 2 (2).
11. *Negotiable.—Innocent Holder.—Non est Factum.*—The defense of *non est factum* is available in favor of the maker of a note, negotiable as an inland bill of exchange, as against an innocent holder for value, before maturity.
Godman v. Henby, 1, 3 (3).

BILLS AND NOTES—Continued.

12. *Negotiable.*—*Title.*—*Innocent Subsequent Indorsees.*—*Equities.*—An innocent subsequent indorsee ordinarily takes negotiable paper free from the equities between the original parties or prior indorsers.
Hamilton Nat. Bank v. Nye, 464, 467 (5).
13. *Extension of Time of Payment.*—*Principal and Surety.*—*Release.*—*Notice.*—In order to release a surety by the extension of the time of payment of a note, such extension must be for a definite time, for a valuable consideration, without the surety's consent, and the holder of the note must have notice of the fact of suretyship. *Weaver v. Prebster*, 582, 584 (1).
14. *Interest.*—*Prepayment.*—*Principal and Surety.*—*Release.*—The principal's payment, without the surety's knowledge, of one year's interest, on June 18, 1898, on a note executed June 26, 1897, payable, with interest, one year after date, does not release the surety, since he contracted to pay such interest.
Weaver v. Prebster, 582, 585 (2).
15. *Extension.*—*Consideration.*—*Principal and Surety.*—*Release.*—The payment, on June 18, of one year's interest due on June 26, does not constitute a consideration for a contract to extend the time of payment of such note for one year from June 26. *Roby, J., not concurring. Weaver v. Prebster*, 582, 585 (3).
16. *Principal and Surety.*—*Release.*—*Contracts.*—*Mutuality.*—The surety on a note is not released by the principal's prepayment of interest, where no agreement was made for the definite extension of the time of payment of such note.
Weaver v. Prebster, 582, 585 (5).

BOARD OF COMMISSIONERS—

May dismiss appeal taken by taxpayers on behalf of, where taxpayers were not parties below, see **APPEAL AND ERROR**, 51; *Board, etc., v. Wild*, 32.

Settlement with county auditor for less than amount due not conclusive, see **COMPROMISE AND SETTLEMENT**, 1; *Zuelly v. Casper*, 186, 191 (4).

BONDS—

Of drainage contractors, actions on, see **PLEADING**, 26; *State, ex rel., v. Karr*, 120, 122 (2).

Liability on, though not approved, see **OFFICERS**, 3; *State, ex rel., v. Frentress*, 245, 247 (5).

Official bond of town marshal admissible in evidence in action thereon, see **EVIDENCE**, 6; *State, ex rel., v. Frentress*, 245, 246 (1).

BOUNDARIES—

1. *Subsequent Surveys.*—*Use of.*—A subsequent survey can be had only to ascertain the lines and corners established by the former survey.
Wilson v. Powell, 44, 47 (2).

2. *Subsequent Surveys.*—*Title.*—Where a division line was agreed upon in 1879, and in 1892, by agreement, the lands were surveyed and the line and corners established, the plaintiff cannot, by giving notice and causing another survey, establish a different boundary line and corners and maintain title up to such new line.
Wilson v. Powell, 44, 47 (3).

BOUNDARIES—Continued.

3. *Surveyors.—Duties.—Title.*—It is the duty of a surveyor to ascertain lines and corners, and a survey cannot have the effect of changing title. *Wilson v. Powell*, 44, 48 (4).

BUILDING AND LOAN ASSOCIATIONS—

Mortgages.—Misrepresentations.—Fraud.—Opinions.—Where defendant executed his bond and mortgage to a building and loan association, and received a certificate of stock therefrom, which bond, mortgage and certificate obligated defendant to make 60 payments on such stock according to the by-laws, and such by-laws provided that as soon as such payments and the profits thereon were sufficient to make such stock worth par such stock would cancel such loan, the fact that plaintiff's agent represented, and defendant relied thereon, that such 60 payments would mature such stock and cancel said loan, constitutes no defense, being a mere opinion upon which defendant had no right to rely. *Hartman v. International Bldg., etc., Assn.*, 28 Ind. App. 65, distinguished. *Wayne, etc., Loan Assn. v. Gilmore*, 146.

BURDEN OF PROOF—

See TRIAL.

CARRIERS—

See INTERURBAN RAILROADS; RAILROADS.

Evidence in case of ejection, see TRIAL, 76; *Terre Haute, etc., R. Co. v. Pritchard*, 420, 423 (2).

Liable for unnecessary force in ejecting passenger, see TRIAL, 39; *Terre Haute, etc., R. Co. v. Pritchard*, 420, 422 (1).

1. *Railroads.—Freight Seized under Legal Process.—Liability of Carrier.*—A common carrier is not liable in damages to the shipper for goods in transit taken upon legal process, in the absence of collusion. *Malott v. Johnson*, 678, 682 (1).
2. *Railroads.—Garnishment.*—A common carrier, in possession of goods in transit within the jurisdiction of the court, is liable in garnishment. *Malott v. Johnson*, 678, 683 (2).
3. *Railroads.—Garnishment.—Statutes.*—A common carrier is not relieved from liability to garnishment because of a contract to ship the goods constituting the subject of garnishment, since §951 Burns 1901, Acts 1897, p. 233, providing that the "garnishee shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time than he would be bound to do for the defendant," must be read in connection with §§944, 952 Burns 1901, §§932, 940 R. S. 1881, providing that such garnishee shall be "accountable to the plaintiff in the action for the * * * property" in his hands, and that such garnishee shall be relieved by payment of money due defendant to the sheriff or into court. *Malott v. Johnson*, 678, 684 (3).
4. *Railroads.—Garnishment.—Jurisdiction.—Statutes.*—Under §931 Burns 1901, §919 R. S. 1881, providing that the plaintiff in garnishment may have judgment when the garnishee who has been summoned in the county where the action is brought is indebted to defendant or has property subject to attachment, the court has jurisdiction to render judgment against a railroad company having in its possession the property of a nonresident who has notice of such action only by publication. *Malott v. Johnson*, 678, 685 (4).

CARRIERS—Continued.

5. *Railroads.—Garnishment.—Writ of Attachment Unserved.—Statutes.*—A judgment may be rendered against a garnishee though there be no service of the writ of attachment upon any goods belonging to the principal defendant (§943 Burns 1901, Acts 1897, p. 283). *Malott v. Johnson*, 678, 686 (5).
6. *Passengers.—Live-Stock Attendant.*—An attendant riding on a freight-train in the car with his live stock, which is shipped under a contract for a fixed charge, including passage for the owner or attendant, is a passenger for hire. *Evansville, etc., R. Co. v. Mills*, 598, 601 (1).

CASES—

See OVERRULED CASES.

Table of cases cited, see p. vii.

CHECKS—

See BILLS AND NOTES.

Authority of salesmen to indorse, see PRINCIPAL AND AGENT, 3; *Hamilton Nat. Bank v. Nye*, 464, 467 (6).

CHILDREN—

Rights of illegitimate, see DESCENT AND DISTRIBUTION, 6-11; *Townsend v. Meneley*, 127.

Statutes making illegitimate, heirs in certain cases, remedial, see STATUTES, 7; *Townsend v. Meneley*, 127, 134 (9).

CITIES—

See MUNICIPAL CORPORATIONS.

CLERICAL ERRORS—

In instruction, see TRIAL, 15-17; *White v. State*, 95.

COLLATERAL ATTACK—

See JUDGMENT.

COMPROMISE AND SETTLEMENT—

As to consideration of family settlements, see CONTRACTS, 4, 5; *Case v. Collins*, 491, 499 (2), 500 (4).

Offers in, not admissible in evidence as admissions, see EVIDENCE, 1; *Indianapolis, etc., Traction Co. v. Dunn*, 248, 253 (9).

1. *Dismissal of Suit.—Officers.—Boards of Commissioners.—Unlawful Fees.—Statutes.*—Where a county auditor retained unlawful fees allowed by the board of commissioners his compromise by the repayment of a less sum to such board is ineffectual to release him, and a dismissal of a pending suit by such board does not affect the matter, since by §7913 Burns 1901, §5811 R. S. 1881, settlements by public officers' paying less than the amount due and owing are not conclusive nor binding on the public. *Zuelly v. Casper*, 186, 191 (4).
2. *New Suit.—Return of Consideration.*—Where defendant pays a certain sum for the dismissal of a pending suit, or pays such sum in an attempted discharge of a larger, liquidated sum, it is not necessary to tender such sum back when a new action is brought for the same cause. *Zuelly v. Casper*, 186, 193 (9).

CONDEMNATION—

See EMINENT DOMAIN.

CONSIDERATION—

See **CONTRACTS**.

Of notes, see **BILLS AND NOTES**, 6, 7; *Weaver v. Prebster*, 582, 585 (4); *Pollard v. Pittman*, 475, 480 (4).

See **FRAUDULENT CONVEYANCES**; *Tyler v. Davis*, 557, 572 (16).

Of settlement between county auditor and board of commissioners need not be returned by taxpayers, where they bring suit to collect balance due, see **COMPROMISE AND SETTLEMENT**, 2; *Zuelly v. Casper*, 186, 193 (9).

Care and support is valuable, see **SPECIFIC PERFORMANCE**; *Fifer v. Rachels*, 275, 277 (1).

Promise to pay *pro rata* share of losses is sufficient, for contract of insurance, see **INSURANCE**, 3; *Posey County Fire Assn. v. Hogan*, 573, 578 (5).

Of antenuptial and postnuptial contracts, see **HUSBAND AND WIFE**, 7, 8, 10; *Unger v. Mellinger*, 639, 644 (7), (8), 645 (10).

CONSTITUTIONAL LAW—

Jurisdiction over cases involving questions of, in Supreme Court, see **COURTS**, 2; *Seelyville Coal, etc., Co. v. McGlosson*, 54.

CONTRACTS—

See **BILLS AND NOTES**; **HUSBAND AND WIFE**; **LANDLORD AND TENANT**; **SALES**; **PLEADING**, 23-26.

Assumption of risk, founded on implied, see **MASTER AND SERVANT**, 3; *Cleveland, etc., R. Co. v. Patterson*, 617, 624 (9).

Oral contracts of insurance, see **PLEADING**, 30, 31; *Posey County Fire Assn. v. Hogan*, 573, 577 (3), 578 (4).

Railroad tickets, see **RAILROADS**, 1, 2; *Pittsburgh, etc., R. Co. v. Coll*, 232, 236 (1), (2).

Oral evidence admissible in cases of reformation, see **EVIDENCE**, 7; *Nichols & Shepard Co. v. Berning*, 109, 117 (8).

Oral insurance contracts, valid, see **INSURANCE**, 1-4; *Posey County Fire Assn. v. Hogan*, 573.

Acceptance of an ordinance creates, see **INTERURBAN RAILROADS**; *Cincinnati, etc., St. R. Co. v. Stahle*, 539, 542 (1).

To constitute, mutuality must be shown, see **BILLS AND NOTES**, 16; *Weaver v. Prebster*, 582, 585 (5).

To take care of owner of property in consideration of the transfer of such property, see **SPECIFIC PERFORMANCE**; *Fifer v. Rachels*, 275, 277 (1).

1. *Associations.—Decisions by Officers of.—Members.—Rights.*—Associations have the right to require all disputes as to the rights of members therein to be submitted for decision to the tribunal established thereby before resort to the courts.

Maitland v. Reed, 469, 472 (2).

2. *Arbitration.—Finality of Decision.—Public Policy.*—A building contract requiring the parties to submit questions in dispute to the architect is valid, and such submission, or a valid excuse, is a condition precedent to the maintenance of an action, but a provision that such architect's decision shall be final is void as against public policy. *Maitland v. Reed*, 469, 470 (1).

3. *Judgment.—Conditions.—Time of Performance.*—Where the heirs enter into a compromise of their disputes as to their rights in a decedent's estate, and a certain time is given to the widow in which to perform certain conditions, the fact that she

CONTRACTS—Continued.

- performed same before complete performance of the conditions by the other heirs, where such conditions were not dependent upon prior performance by such others, cannot be objected to by the other heirs. *Hartzell v. Hartzell*, 481, 484 (2).
4. *Family Settlements.—Consideration.*—A contract executed by the children of decedent, the surviving husband and the second wife, in settlement of the property interests in the deceased wife's estate is supported by a sufficient consideration. *Case v. Collins*, 491, 499 (2).
5. *Family Settlements.—Consideration.—Widow's Election.—Statutes.*—A contract by the second wife, the husband and the children of the deceased first wife, in settlement of the property rights in the estate of such decedent, is supported by a valuable consideration as to such second wife, and she has no right under §2665 Burns 1901, §2504 R. S. 1881, to a period of one year after such husband's death to decide whether she will be bound by such contract of settlement. *Case v. Collins*, 491, 500 (4).
6. *Breach.—Damages Recoverable.*—The defendant who violates his contract with plaintiff is liable for all damages naturally arising or reasonably supposed to be expected to arise from such breach. *Kagy v. Western Union Tel. Co.*, 73, 78 (1).
7. *Manufacture of Goods.—Breach.*—Where plaintiff contracted to sell to defendant all the sash weights it should make during the period of such contract, reserving the "right to discontinue the making" thereof any time during such period, its exercise of such right of discontinuance was not a breach of such contract. *Over v. Byram Foundry Co.*, 452, 455 (2).
8. *Release of Claim for Damages.—Ratification.*—Where a company's general agent entered into a contract with an injured employe for the release of his claim for damages, and such company took and retained such contract and made several payments thereunder, ratification thereof is established. *American Quarries Co. v. Lay*, 386, 392 (6).
9. *Signed by One Party.—Acted Upon by Other.*—A writing, signed by an injured employe, releasing a company from liability for damages in consideration of the payment of certain sums and future employment, which writing is not signed but is acted upon by such company, is binding upon both. *American Quarries Co. v. Lay*, 386, 390 (2).
10. *Oral.—Not to be Performed Within the Year.—Frauds, Statute of.*—An oral contract by a company to pay an injured employe certain wages during disability, to pay his nurse hire, doctors' bills, and to give him employment when recovered, in consideration of a release of his claim for damages, is not within the statute of frauds, since such contract, being personal, may terminate by the death of such employe within the year. *American Quarries Co. v. Lay*, 386, 389 (1).
11. *"During Disability."—Question for Jury.*—Where plaintiff by a contract released his claim for damages partly in consideration of certain payments "during disability," the time covered by such disability was a question for the jury. *American Quarries Co. v. Lay*, 386, 392 (7).
12. *Leases.—Ambiguous.—Gas and Oil.*—A gas-and-oil lease providing that the lessee "may cancel and annul this contract or any part thereof at any time," is ambiguous, and in construing such a lease courts will look to the nature of the instrument and the intention of the parties. *Ramage v. Wilson*, 532, 536 (1).

CONTRACTS—Continued.

13. *Antenuptial.—Validity.*—Antenuptial contracts, free from fraud or imposition, and not against public policy, are enforceable. *Watson v. Watson*, 548, 551 (2).
14. *Antenuptial.—Fixing Amount of Alimony.—Public Policy.*—An antenuptial contract providing that upon separation for any cause the husband shall pay the wife \$200 in settlement of all liability for alimony is contrary to public policy and void. *Watson v. Watson*, 548, 552 (4).
15. *Postnuptial.—Consideration.—Marriage.*—Marriage alone cannot constitute a valuable consideration for a postnuptial contract. *Clow v. Brown*, 172, 182 (2).
16. *Postnuptial.—Consideration.—Antenuptial.—Discharge.*—Where a man entered into an antenuptial contract with his intended, whereby she released any claim to his estate in the event she survived him and agreed to receive from his estate in lieu of her statutory rights \$10,000, her release of such antenuptial contract by a postnuptial contract whereby she accepted a lien upon his property for a much smaller sum in full satisfaction thereof, is founded upon a valuable consideration. *Clow v. Brown*, 172, 182 (3).
17. *Restraint of Trade.—Monopolies.—Statutes.*—A contract by which plaintiff agrees to sell all of the sash weights it should make during the "remainder of the year" to defendant, a manufacturer of sash weights, is not void as being in violation of §3312g Burns 1901, Acts 1897, p. 159, §1, providing that all contracts, by persons who "control the output of said article of merchandise," made to prevent competition "in the importation or sale of articles imported into this State," shall be void. *Over v. Byram Foundry Co.*, 452, 455 (3).
18. *Monopolies.—Common Law.—Test.*—A contract by which plaintiff agreed to sell all of the sash weights it should make during "the remainder of the year" to defendant, also a manufacturer of sash weights, is not void at the common law as monopolistic, the test being whether such contract is inimical to public interest. *Over v. Byram Foundry Co.*, 452, 457 (4).
19. *Corporations.—Ultra Vires.—Public Duty.*—A manufacturing corporation may lawfully contract its output for a limited time to one person. *Over v. Byram Foundry Co.*, 452, 458 (5).
20. *Master and Servant.—Negligence.—Works, Ways and Machinery.*—Contracts by which the master becomes responsible for injuries to servants caused by defects in the works, ways and machinery are valid. *Cleveland, etc., R. Co. v. Patterson*, 617, 625 (11).
21. *Execution.—Negligence.—Fraud.—Reformation.*—Where defendant, a German, unable to read or write the English language, orally agreed with plaintiff's agents upon the limits of his liability, but plaintiff's agents, one of whom was defendant's cousin in whom defendant placed reliance to see that the contract as written expressed the agreed terms, wrote the contract essentially different, thus making defendant liable without limitations, and defendant executed same thinking, and being assured by such agents that the written contract embodied the oral terms, he is not guilty of negligence, no outside parties being involved. *Nichols & Shepard Co. v. Berning*, 109, 114 (4).

CONTRACTS—Continued.

22. *Sales.—Enforcement.*—A contract fixing the price and terms of a sale of sash weights governs the amount of recovery therefor unless there is some exception taking the case out of the general rule. *Over v. Byram Foundry Co.*, 452, 455 (1).

CONTRIBUTION—

See EQUITY.

- Sureties.—Bills and Notes.*—Where three sureties pay an equal amount of the debt for which they are jointly liable there can be no contribution. *Pollard v. Pittman*, 475, 479 (3).

CONTRIBUTORY NEGLIGENCE—

See MASTER AND SERVANT; NEGLIGENCE; RAILROADS.

CONVERSION—

Of trust funds, complaint for, see PLEADING, 68; *Case v. Collins*, 491, 500 (3).

Property purchased by husband with wife's money, at her death, passes to her heirs, see DESCENT AND DISTRIBUTION, 3; *Case v. Collins*, 491, 499 (1).

CORPORATIONS—

See BUILDING AND LOAN ASSOCIATIONS; CARRIERS; INTERURBAN RAILROADS; RAILROADS.

Agents, authority of, see PRINCIPAL AND AGENT, 2; *American Quarries Co. v. Lay*, 386, 391 (5).

May contract output for limited time to one person, see CONTRACTS, 19; *Over v. Byram Foundry Co.*, 452, 458 (5).

COSTS—

As to costs taxable in criminal cases, see CRIMINAL LAW, 3-5; *Cameron v. State*, 381.

1. *Basis of Right.*—Costs are given or withheld by legislative authority.

Douglas v. Indianapolis, etc., Traction Co., 332, 339 (9).

2. *Eminent Domain.—Appeals from Awards.—Civil Actions.*—Costs, in an appeal from an award in condemnation, are taxable as in other civil causes on appeal.

Douglas v. Indianapolis, etc., Traction Co., 332, 339 (10).

COUNTY AUDITOR—

Collecting back unlawful fees paid to, see OFFICERS, 5; *Zuelly v. Casper*, 186, 191 (3).

Not proper relator in action on drainage contractor's bond for failure to execute contract, see PLEADING, 26; *State, ex rel., v. Karr*, 120, 122 (2).

COUNTY SURVEYOR—

Cannot convey title by fixing boundaries, see BOUNDARIES, 2, 3; *Wilson v. Powell*, 44, 47 (3), 48 (4).

COURTS—

Alimony, a question for, see DIVORCE, 1; *Watson v. Watson*, 548, 551 (1).

Appellate Court has no jurisdiction in mandate cases, see APPEAL AND ERROR, 61; *Funk v. State, ex rel.*, 231.

Appellate Court has no jurisdiction of appeals involving a mere money demand for not over \$50, see APPEAL AND ERROR, 34; *Yakey v. Leich*, 393, 394 (1).

COURTS—Continued.

Failure to comply with rules of Appellate Court in preparation of brief waives alleged errors, see **APPEAL AND ERROR**, 11-22.

Should not invade the province of the jury, see **JURY**; *Cincinnati, etc., St. R. Co. v. Stahle*, 539, 546 (12).

Have jurisdiction to render judgment in garnishment against a railroad company, where debtor is a nonresident and notice has been given to him by publication, see **CARRIERS**, 4; *Malott v. Johnson*, 678, 685 (4).

Manner of presenting case on appeal is for appellate courts, and not for legislature, see **APPEAL AND ERROR**, 42; *Baker v. Gowland*, 364, 368 (5).

1. *Duty.—Furtherance of Justice.*—It is the duty of courts to exercise their authority in such way that justice will be subserved, and wrong prevented. *Coulter v. Bradley*, 697, 701 (2).

2. *Jurisdiction.—Appeal and Error.—Constitutional Law.—Statutes.—Payment of Wages.*—Where, on appeal to the Appellate Court, the constitutional validity of §§7065, 7068 Burns 1901, Acts 1887, p. 13, §§1, 4, providing for the payment of wages to employes biweekly, is involved, jurisdiction is in the Supreme Court and such cause will be transferred thereto.

Seelyville Coal, etc., Co. v. McGlosson, 54.

COVENANTS—

See **LANDLORD AND TENANT**.

For payment of rent, runs with lease, see **LANDLORD AND TENANT**, 9; *Robyn v. Pickard*, 161.

A covenant in a warranty deed does not cover future street assessments, see **DEEDS**, 1; *Mullen v. Clifford*, 435, 437 (2).

Conveyance, subject to street assessments after 1901, may be found to mean that grantee was to pay assessments falling due after 1901, see **DEEDS**, 2; *Mullen v. Clifford*, 435, 438 (3).

CRIMINAL LAW—

See **INDICTMENT AND INFORMATION**; **TRIAL**.

Misconduct in argument of counsel, see **TRIAL**, 2, 3; *White v. State*, 95, 103 (7), 104 (8).

Civil procedure act of 1903 (Acts 1903, p. 338) does not apply to, see **APPEAL AND ERROR**, 23; *Guy v. State*, 691, 696 (7).

Withdrawal of evidence of communicated threats, when harmless, see **EVIDENCE**, 4; *Guy v. State*, 691, 693 (3).

Statutes for punishment of crimes, strictly construed, see **STATUTES**, 3; *Hoffmeyer v. State*, 526, 532 (3).

Grounds for new trial in criminal cases, see **NEW TRIAL**, 1, 2; *De Tarr v. State*, 323, 324 (1), (2).

1. *Baseball.—Sunday.—Fee.*—Where the management of a Sunday game of baseball charged fifteen cents for seats in the grandstand and ten cents for "bleachers," there is a violation of law, the claim that the fee was paid for the "seats" and not for the game being a subterfuge or an attempt to evade the statute. *Heigert v. State*, 398, 401 (1).

2. *Baseball.—Sunday.—Fee.*—Where a Sunday baseball game was not free and an admission was charged to some of the spectators, the law is violated, though some may witness such game without the payment of any fee.

Heigert v. State, 398, 401 (2).

CRIMINAL LAW—Continued.

3. *Conviction.—Acquittal.—Costs.*—On acquittal of a defendant in a criminal case no costs are taxable, but on conviction, all proper costs are taxable against defendant unless the court or jury shall relieve him from such payment.

Cameron v. State, 381, 383 (3).

4. *Conviction.—Costs.*—Defendant in a criminal case, on conviction, is not taxable with costs of State's witnesses not indorsed on the indictment, and who were not sworn, or who, if sworn, failed to testify to any material fact.

Cameron v. State, 381, 384 (4).

5. *Plea of Guilty.—Costs.*—Defendant, on a plea of guilty, is taxable with costs of all witnesses, whether indorsed on the indictment or not, unless he shows that unnecessary witnesses were subpoenaed by the State, the presumption being that the prosecuting attorney acted in good faith and subpoenaed only those he thought necessary.

Cameron v. State, 381, 385 (5).

6. *Statutes.—Factory Act.—Reporting Accidents.—Interurban Railroads.—To Whom Statute Applies.*—Section eight of the factory act (Acts 1899, p. 231, §7087h Burns 1901), providing that any person having charge of a manufacturing establishment shall, within forty-eight hours after the happening of any accident therein, report same to the state factory inspector, applies to the superintendent of a street railroad company's repair shop where its cars are repaired and other work done for the use of such company by persons "employed for hire," although nothing is made for sale therein.

Hoffmeyer v. State, 526, 527 (1).

7. *Indictment and Information.—Amendments.—Statutes.*—The criminal code of 1905 (Acts 1905, p. 584) does not apply to prosecutions begun prior to its taking effect; and where an affidavit, in an appeal from a justice of the peace, is quashed in the circuit court, such affidavit being filed before the taking effect of said act of 1905, the State has no right to amend such affidavit under said act of 1905 (Acts 1905, pp. 584, 622, §172).

State v. Clark, 105.

8. *Statutes.—Gambling.—Dice.—Indictment and Information.*—An indictment charging defendant with keeping and exhibiting for the purpose of gain a certain gambling device known as "dice" states a public offense under §2181 Burns 1901, §2086 R. S. 1881, providing that it shall constitute a crime for any person to keep or exhibit for gain "any gaming table * * * or any gambling apparatus, device, table or machine of any kind or description, under any denomination or name whatever."

White v. State, 95, 97 (1).

9. *Intoxicating Liquors.—Sales.—Druggists.*—Where a druggist, who was also a practicing physician, filed a practicing physician's written prescription, in good faith, for a half-pint of whiskey for such physician's patient, to be taken a teaspoonful every hour, and such whiskey was so taken, a conviction for an unlawful sale of whiskey under §7283j Burns 1901, Acts 1895, p. 248, §9½, cannot be upheld, though such practicing physician had no license at the time to practice medicine.

De Tarr v. State, 323, 327 (4).

10. *Witnesses.—Rights of State.*—The State may subpoena witnesses and compel their attendance whether their names are indorsed on the back of the indictment or not.

Cameron v. State, 381, 383 (2).

CROSS-COMPLAINT—

See PLEADING, 21, 22.

DAMAGES—

By nuisance, how proved, see NUISANCE; *City of Huntington v. Stemen*, 553, 556 (4).

Burden of proof, on landowner to show damages in condemnation, see EMINENT DOMAIN, 5, 8; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 337 (4); *Indianapolis, etc., Traction Co. v. Ramer*, 264, 273 (6).

Carriers not liable in damages for goods taken from their custody by legal process, see CARRIERS, 1; *Malott v. Johnson*, 678, 682 (1).

Elements of, in eminent domain, see EMINENT DOMAIN, 9, 10; *Indianapolis, etc., Traction Co. v. Ramer*, 264, 272 (5); *Indianapolis, etc., Traction Co. v. Dunn*, 248, 252 (7).

Excessive, not ground for a new trial in contract actions, see NEW TRIAL, 3, 4; *American Quarries Co. v. Lay*, 386, 391 (3), (4).

For failure to deliver telegraph message, see TELEGRAPHS AND TELEPHONES, 1-4; *Kagy v. Western Union Tel. Co.*, 73.

Complaint showing a breach of contract, entitles plaintiff to nominal, see PLEADING, 25; *Grau v. Grau*, 635, 638 (4).

Defendant not liable for, to property rejected, subsequent to rejection, see SALES, 2; *Allyn v. Burns*, 223, 228 (4).

Are recoverable for all losses naturally arising or reasonably supposed to be expected to arise from the breach of a contract, see CONTRACTS, 6; *Kagy v. Western Union Tel. Co.*, 73, 78 (1).

1. *Excessive.—Railroads.—Wrongful Refusal to Honor Ticket.*—Where defendant railroad company wrongfully refused to honor plaintiff's ticket and by reason thereof he was forcibly and roughly expelled from defendant's station and threatened with arrest in the presence of a great number of people, a verdict for \$2,000 is excessive, there being no injury to health or loss of business.

Pittsburgh, etc., R. Co. v. Coll, 232, 238 (5).

2. *Prospective Pain.—Negligence.*—Plaintiff is entitled to recover for pain and suffering reasonably certain to result from his injuries received by reason of defendant's negligence.

Muncie Pulp Co. v. Hacker, 194, 208 (9).

3. *Punitive.—Alienation.*—Exemplary or punitive damages may be given in an action for the alienation of the affections of husband or wife.

Gregg v. Gregg, 210, 217 (4).

4. *Speculative.—Proximate Cause.*—*Telegraphs and Telephones.—Failure to Send Message.*—The damages for which defendant telegraph company is liable for its failure to send a message must result from such failure as a proximate cause, and must not be speculative.

Kagy v. Western Union Tel. Co., 73, 78 (2).

5. *Measure of.—Telegraphs and Telephones.—Failure to Send Message.*—Unless the defendant telegraph company has notice from the sender or from the nature of the message that a failure to send same will be attended with damages none are collectible except the cost of such message.

Kagy v. Western Union Tel. Co., 73, 79 (3).

DEATH—

After appeal taken, effect of on rendition of judgment, see **APPEAL AND ERROR**, 33; *American Quarries Co. v. Lay*, 386, 393 (9).

Of party, representative must be substituted, see **APPEAL AND ERROR**, 49; *Ehlers v. Hartman*, 617.

DECEDENTS' ESTATES—

See **DESCENT AND DISTRIBUTION**; **EXECUTORS AND ADMINISTRATORS**.

Husband takes one-third interest in deceased wife's real estate received as a gift from her father, free from such wife's creditors, see **DESCENT AND DISTRIBUTION**, 4; *Weaver v. Gray*, 35, 39 (1).

Not liable for attorneys' fees in note, where note was filed as a claim before due and properly allowed, see **BILLS AND NOTES**, 2; *St. Joseph County Sav. Bank v. Randall*, 402, 405 (4).

Final Report.—Right of Administrator to a Discharge.—Upon the approval of the final report of an administratrix, she is entitled to be discharged. *Hartzell v. Hartzell*, 481, 484 (1).

DECEIT—

Attorney liable to client for, see **ATTORNEY AND CLIENT**; *Whitesell v. Study*, 429, 435 (7).

Complaint for, failing to show that deceit was practiced upon plaintiff is bad, see **PLEADING**, 27; *Whitesell v. Study*, 429, 435 (6).

DECLARATIONS—

See **EVIDENCE**.

DEDICATION—

Of highway, see **HIGHWAYS**, 4, 5; *McClaskey v. McDaniel*, 59, 71 (4), (5).

DEEDS—

See **FRAUDULENT CONVEYANCES**.

Delivery should be found as a fact, see **TRIAL**, 57; *Corr v. Martin*, 655, 659 (3).

In consideration of care and support, valid, see **SPECIFIC PERFORMANCE**; *Fifer v. Rachels*, 275, 277 (1).

Declaring a deed to be a mortgage, see **PLEADING**, 51; *Warner v. Jennings*, 394, 397 (1).

Cannot convey separately an inchoate right, see **HUSBAND AND WIFE**, 9; *Unger v. Mellinger*, 639, 645 (9).

Vendee, purchasing for another with such person's money, holds in trust, see **TRUSTS**; *Catterson v. Hall*, 341, 350 (6).

1. *Covenants.—Street Assessments.*—It is not necessary to insert in a warranty deed for a lot a provision that the grantee shall pay subsequent street assessments, since he is liable therefor without such provision. *Mullen v. Clifford*, 435, 437 (2).

2. *Covenants.—Liens.—Assumption of Payment of.—Evidence.*—Where the grantor warranted to the grantee a certain lot "subject to assessments for street improvements after 1901," and the evidence of the intention of the parties was conflicting,

DEEDS—Continued.

the court was authorized to find that the grantee was to pay instalments for street assessments falling due after 1901.

Mullen v. Clifford, 435, 438 (3).

3. *Delivery.—Question for Jury.*—Whether there was a delivery of a deed, which involves an intentional parting with the control over same, is usually a question of fact for the jury.

Fifer v. Rachels, 275, 277 (2).

4. *Delivery.—Estoppel.—Heirs.*—Where decedent agreed to deliver plaintiff a deed to his farm in consideration of care and maintenance, and plaintiff was led to believe that the deed executed by decedent was held in escrow for her and was to be delivered at her request, such decedent's heirs will be estopped from claiming that there was a failure of delivery, where it is shown that plaintiff in good faith relied thereon and performed her part of the contract.

Fifer v. Rachels, 275, 278 (5).

5. *Delivery.—Recording.—Possession.—Presumptions.*—There is a disputable presumption that a deed in the possession of the grantee, or recorded by the procurement of the grantor, has been delivered.

Corr v. Martin, 655, 659 (4).

6. *Escrow.—Title.*—A deed held in escrow conveys no title.

Corr v. Martin, 655, 659 (2).

DELIVERY—

Of deeds, see **DEEDS**.

DEMAND—

Not necessary for reformation prayed in cross-complaint, see **REFORMATION OF INSTRUMENTS**; *Nichols & Shepard Co. v. Berning*, 109, 114 (3).

DEMURRER—

See **PLEADING**.

Failure to demur, testing sufficiency of defenses by questioning the evidence, see **PLEADING**, 12; *Zuelly v. Casper*, 186, 188 (1).

DESCENT AND DISTRIBUTION—

Where antenuptial contract is set aside, husband inherits under the law, see **HUSBAND AND WIFE**, 5; *Clow v. Brown*, 172, 186 (5).

Statutes making illegitimate children heirs in certain cases, remedial, see **STATUTES**, 7, 8; *Townsend v. Meneley*, 127, 134 (9), 134 (10), 138 (10).

Lands of a deceased wife, received as a gift from her father, descend, one-third to her husband, and two-thirds, subject to the payment of her debts, to her father, see **PARTITION**; *Weaver v. Gray*, 35, 41 (2).

Husband and wife's inchoate rights in each other's property vest only at death, see **HUSBAND AND WIFE**, 6; *Unger v. Mellinger*, 639, 644 (6).

1. *Creditors.—Rights to Personalty.—Liability of Heirs.*—Creditors have the right, by properly filing their claims as provided by §2465 Burns 1901, Acts 1883, p. 151, §5, to share in the distribution of the personal estate of a decedent; and unless their claims are so filed, they cannot afterwards collect same from heirs receiving such property.

St. Joseph County Sav. Bank v. Randall, 402, 404 (1).

DESCENT AND DISTRIBUTION—Continued.

2. *Creditors.—Mortgages.—Waiving Right to Share in Personalty.*—A mortgagee of a decedent, by failure to file his claim as provided by §2465 Burns 1901, Acts 1883, p. 151, §5, waives his right to share in the decedent's personal property; and his sole right to collect such debt is to subject such mortgaged property to the payment thereof.
St. Joseph County Sav. Bank v. Randall, 402, 404 (2).
3. *Personalty.—Conversion.—Taking Title in Individual Name.*—Property purchased by the husband with money belonging to the wife, on deposit in a bank at her death, equitably belongs, two-thirds to her children and one-third to such husband.
Case v. Collins, 491, 499 (1).
4. *Husband's Interest in Wife's Real Estate.—Debts of Decedent.—Statutes.*—Where the deceased childless wife received lands as a gift from her father, one-third of such real estate under §2642 Burns 1901, Acts 1891, p. 71, §1, descends in fee to the husband and such one-third is not assets of her estate nor liable for her debts; and the other two-thirds, under §2628 Burns 1901, §2473 R. S. 1881, descends, subject to her debts, to the father, if living. *Herbert v. Rupertus*, 31 Ind. App. 553, distinguished.
Weaver v. Gray, 35, 39 (1).
5. *Withholding Legacies or Shares in Payment of Debts.*—The executor or administrator of an estate may withhold a sufficient sum belonging to a legatee or to the heir to satisfy any claim from such legatee or heir to the estate.
Weaver v. Gray, 35, 42 (4).
6. *Illegitimate Children.—Common Law.*—At the common law an illegitimate child was not an heir of its deceased father.
Townsend v. Meneley, 127, 129 (1).
7. *Illegitimate Children.—Statutes.*—Under §2630 Burns 1901, §2475 R. S. 1881, Acts 1853, p. 78, §1, an illegitimate child could inherit from its father only where such father left no legal heirs within the United States, nor legitimate children without the United States. *Townsend v. Meneley*, 127, 129 (2).
8. *Illegitimate Children.—Statutes.—Repeal.*—The act of 1901 (Acts 1901, p. 288, §2630a Burns 1901), providing that illegitimate children shall be heirs of their fathers under certain circumstances, repeals the act of 1853 (Acts 1853, p. 78, §1, §2630 Burns 1901, §2475 R. S. 1881) upon the same subject.
Townsend v. Meneley, 127, 130 (3).
9. *Illegitimate Children.—Burden of Proof.*—The burden of proof to establish that plaintiff is the illegitimate child of her father and that he acknowledged her to be his child, is upon plaintiff.
Townsend v. Meneley, 127, 132 (6).
10. *Illegitimate Children.—Acknowledgment.—Evidence.*—Where decedent told respective witnesses that the plaintiff, an illegitimate child, "was dead sure mine;" "was his'n;" was the only child he had; "she [plaintiff's mother] had had a child and it was his'n," acknowledgment of paternity is sufficiently shown, there being no contradictory evidence.
Townsend v. Meneley, 127, 132 (7).
11. *Heirs.—When Persons Become.*—A person becomes an heir at the death of the ancestor, and not before.
Townsend v. Meneley, 127, 134 (8).

DISMISSAL AND NONSUIT—

Appeal will be dismissed where taken by persons who were not parties to the record below, see **APPEAL AND ERROR**, 51; *Board, etc., v. Wild*, 32.

Does not prevent prior decision on appeal from being law of case subsequently brought for same cause, see **APPEAL AND ERROR**, 37; *Hancock v. Diamond Plate Glass Co.*, 351, 361 (3).

Acceptance of payment on judgment is ground for dismissal of appeal therefrom, see **APPEAL AND ERROR**, 24; *Thomson v. Midland Portland Cement Co.*, 459.

Dismissal of suit upon payment by county auditor of only a part of his indebtedness to the county, not conclusive, see **COMPROMISE AND SETTLEMENT**, 1; *Zuelly v. Casper*, 186, 191 (4).

Rights of Parties.—Statutes.—Under §336 Burns 1901, §333 R. S. 1881, plaintiff may dismiss his cause of action at any time before the jury retires or before the court's decision is announced, the effect being that plaintiff must pay the costs, and such dismissal does not preclude the bringing of a new case for the same cause. *Zuelly v. Casper*, 186, 192 (5).

DIVORCE—

Alimony to be received by wife in event of divorce, not subject of contract, see **CONTRACTS**, 14; *Watson v. Watson*, 548, 552 (4).

1. *Alimony.—Question for Court.*—The amount of alimony in a case of divorce is a question for the court, reviewable only in cases of abuse of discretion.

Watson v. Watson, 548, 551 (1).

2. *Alimony.—Decree.—Effect.*—A decree of divorce necessarily settles both the marital and the property rights of the parties thereto.

Watson v. Watson, 548, 553 (5).

DRAINS—

Interested party may be relator in action upon drainage contractor's bond, see **ACTION**, 1; *State, ex rel., v. Karr*, 120, 124 (3).

DRUGGISTS—

Sales of intoxicating liquors by, see **CRIMINAL LAW**, 9; *De Tarr v. State*, 323, 327 (4).

EASEMENTS—

Additional Servitude.—Street Railroads.—A street railroad in a city street does not constitute an additional servitude upon the frontagers' lots.

Indianapolis, etc., Traction Co. v. Ramer, 264, 270 (2).

ELECTION—

Not to determine lease, by acceptance of rental, see **LANDLORD AND TENANT**, 1; *American, etc., Glass Co. v. Indiana, etc., Co.*, 439, 444 (2).

No right of, by widow who was a second wife, after execution of family settlement of rights in estate of deceased first wife's estate, see **CONTRACTS**, 5; *Case v. Collins*, 491, 500 (4).

ELEVATORS—

Contributory negligence of passenger of, when for jury, see **APPEAL AND ERROR**, 68; *Fletcher v. Kelly*, 254, 260 (2).

EMINENT DOMAIN—

Costs in appeals from award in, taxable as in other civil cases, see COSTS, 2; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 339 (10).

Statutes relating to exercise of, by interurban railroad companies, see STATUTES, 9, 10; *Indianapolis, etc., Traction Co. v. Ramer*, 264, 266 (1), 272 (4).

1. *Interurban Railroads.—Award.—Effect.*—The award of appraisers in condemning land for a right of way for an interurban railroad is not final, but either party may except thereto and appeal.

Indianapolis, etc., Traction Co. v. Dunn, 248, 249 (1).

2. *Interurban Railroads.—Appeal from Award.—Trial.*—Where an interurban railroad company appeals from an award in condemnation, the cause on appeal is tried *de novo*, and if the judgment on appeal is greater than the award, such company must pay same or such land cannot be held.

Indianapolis, etc., Traction Co. v. Dunn, 248, 250 (3).

3. *Interurban Railroads.—Award.—Receipt of.—Effect.*—If a landowner accepts the money in payment of an award in condemnation of an interurban railroad right of way, he is estopped from afterwards appealing or questioning such award.

Indianapolis, etc., Traction Co. v. Dunn, 248, 250 (4).

4. *Interurban Railroads.—Appeal from Award.—Effect.*—An interurban railroad company may appeal from an award in condemnation although it has paid such award into court, such payment giving it the immediate right to possession.

Indianapolis, etc., Traction Co. v. Dunn, 248, 251 (5).

5. *Interurban Railroads.—Awards.—Exceptions.—Effect of.—Burden of Proof.*—The filing of an exception to an award, in condemnation proceedings by an interurban railroad company, in effect sets aside such award and the cause must be tried *de novo*, the burden being upon the landowner to prove his damages.

Douglas v. Indianapolis, etc., Traction Co., 332, 337 (4).

6. *Awards.—Payment.—Effect of.*—The payment of an award in condemnation, by an interurban railroad company, gives the right of possession to the lands appropriated, but does not preclude an appeal by such company.

Douglas v. Indianapolis, etc., Traction Co., 332, 337 (5).

7. *Awards.—Appeal.—Judgment for Excess.*—Where an interurban railroad company paid an award in condemnation, but on appeal the verdict was for a smaller sum, the trial court is authorized to render judgment in favor of such company for the excess so paid, such payment being involuntary in a legal sense. *Douglas v. Indianapolis, etc., Traction Co.*, 332, 338 (7).

8. *Burden of Proof.*—The burden of proof in cases of eminent domain is upon the landowner to show his loss.

Indianapolis, etc., Traction Co. v. Ramer, 264, 273 (6).

9. *Interurban Railroads.—Damages.—Elements.—Speculative.*—In determining the damages to a landowner by the appropriation of a right of way for an interurban railroad the jury should consider such owner's inconvenience thereby, loss in tillage, use and occupation of the land, annoyance by the operation of the road, exposure of plaintiff, family and stock to injury, and annoyance, inconvenience and danger in

EMINENT DOMAIN—Continued.

crossing from one part of the farm to the other, but speculative damages cannot be given.

Indianapolis, etc., Traction Co. v. Ramer, 264, 272 (5).

10. *Interurban Railroads.—Damages.—Benefits.—Statutes.*—The statutes permitting interurban railroad companies to condemn lands for a right of way must be construed *in pari materia* with those granting such rights to railroads, and no benefits can be considered in estimating such damages.

Indianapolis, etc., Traction Co. v. Dunn, 248, 252 (7).

11. *Interurban Railroads.—Payment.—Title.*—The payment of an award in condemnation gives an interurban railroad company the right to possession of the condemned land, and if no appeal be taken, such payment gives title which relates from the day of payment.

Indianapolis, etc., Traction Co. v. Dunn, 248, 250 (2).

12. *Streets.—Municipal Corporations.*—Towns have the right to exercise the power of eminent domain for the widening of streets, but until the statutes prescribing the method of condemnation have been fully complied with, such towns have no right to take lands for such purposes.

Town of Syracuse v. Weyrick, 56, 58 (1).

EMPLOYERS' LIABILITY ACT—

See MASTER AND SERVANT.

Complaint for violation of, see PLEADING, 47; *Clear Creek Stone Co. v. Carmichael*, 413, 415 (1).

EQUITY—

As to equitable estoppel, see HIGHWAYS, 3; *McClaskey v. Mo-Daniel*, 59, 70 (3).

As to contribution between sureties on a note, see BILLS AND NOTES, 8; *Pollard v. Pittman*, 475, 480 (5).

Where sureties pay equal amounts, no right to contribution exists, see CONTRIBUTION; *Pollard v. Pittman*, 475, 479 (3).

ESROW—

Deed held in, conveys no title, see DEEDS, 6; *Corr v. Martin*, 655, 659 (2).

ESTATES—

See DECEDENTS' ESTATES; DESCENT AND DISTRIBUTION.

Life tenant may be enjoined from cutting timber and hauling it away, see INJUNCTION, 1; *Richmond Nat. Gas Co. v. Davenport*, 25, 30 (3).

1. *Real.—Gas and Oil.—Injunction.—Waste.*—Gas and oil, not reduced to possession, are real estate, and belong to the owners of the fee who may protect same by injunction, the taking of same by the life tenant being waste.

Richmond Nat. Gas Co. v. Davenport, 25, 30 (2).

2. *Life Tenants.—Right to Use of Gas-and-Oil Wells.*—Where the owner of the fee has oil-and-gas wells in operation and a life estate is afterwards created, the life tenant will be entitled to the use of, or royalty from, such wells, but such tenant has no right to begin operations nor to lease to others the right to do so.

Richmond Nat. Gas Co. v. Davenport, 25, 31 (4).

ESTOPPEL—

Dismissal by agreement, not *res judicata* as to plaintiffs' right of action, see JUDGMENT, 8; *Zuelly v. Casper*, 186, 192 (6).

Deputy marshal estopped to deny that he was an officer *de jure*, see OFFICERS, 1; *State, ex rel., v. Frentress*, 245, 247 (3).

Heirs are estopped to deny delivery of a deed by representations of ancestor that he placed such deed in escrow for plaintiff, see DEEDS, 4; *Fifer v. Rachels*, 275, 278 (5).

When owner is equitably estopped from denying road is a public highway, see HIGHWAYS, 3; *McClaskey v. McDaniel*, 59, 70 (3).

Misrepresentations. — Sales. — Mortgages. — Deeds. — Fraud. —
A landowner is not estopped from denying the validity of a mortgage where he in good faith represented to the mortgagee's attorney that he had sold to a third party his farm and such attorney afterward made and delivered to such third party the deed to be executed by the landowner to such third party, which deed was returned by such third party with the landowner's name and notary's certificate forged thereon, and the mortgagee loaned the money to such third party in good faith thinking the deed genuine. *Williams v. Ketcham*, 506.

EVIDENCE—

See NEW TRIAL.

Sufficiency of, to establish acknowledgment of illegitimate child, see DESCENT AND DISTRIBUTION, 10; *Townsend v. Meneley*, 127 132 (7).

Admission of incompetent evidence harmless, where defendant did not question liability or amount of judgment, see APPEAL AND ERROR, 25; *Indianapolis, etc., Transit Co. v. Reeder*, 262, 263 (2).

Must be literally or substantially set out in brief in order to raise question thereon on appeal, see APPEAL AND ERROR, 12-15.

Where not all presented on appeal, no question affected by the omitted evidence can be presented, see APPEAL AND ERROR, 10; *Cincinnati, etc., St. R. Co. v. Stahle*, 539, 544 (6).

Appellate Court will not weigh conflicting oral evidence on appeal, see APPEAL AND ERROR, 65.

Sufficiency of, to show delivery of note, see BILLS AND NOTES, 9; *Godman v. Henby*, 1, 3 (4).

Of suicide, sufficiency, see INSURANCE, 8; *Equitable Life Ins. Co. v. Hebert*, 373, 375 (2).

Inference from conduct of dedication of road as public highway, see HIGHWAYS, 4; *McClaskey v. McDaniel*, 59, 71 (4).

Return of indictment properly indorsed, is evidence that five grand jurors voted for it, see INDICTMENT AND INFORMATION, 1; *Guy v. State*, 691, 693 (1).

Where there is some evidence from which an inference of negligence could arise, the verdict and judgment below will not be disturbed on appeal, see APPEAL AND ERROR, 67; *Southern Ind. R. Co. v. Baker*, 405, 411 (5).

Fletcher v. Kelly, 254, 260 (1).

Where evidence is held insufficient on prior appeal, it will be on subsequent, unless additional non-cumulative evidence is offered, see APPEAL AND ERROR, 41; *Fifer v. Rachels*, 275, 277 (4).

EVIDENCE—Continued.

Direct, not necessary as to every allegation, inferences being sufficient, see *TRIAL*, 8; *Evansville, etc., R. Co. v. Mills*, 598, 603 (4).

Weight of, for jury, see *TRIAL*, 42-44.

Only that favorable to plaintiff can be considered on peremptory instruction, see *TRIAL*, 23; *Roberts v. Terre Haute Electric Co.*, 664, 671 (3).

1. *Admissions.—Eminent Domain.—Interurban Railroads.—Compromise.*—An offer made by a landowner as a compromise of damages prior to the taking of his land by condemnation proceedings by an interurban railroad company for its right of way, is not admissible in evidence in such action as an admission. *Indianapolis, etc., Traction Co. v. Dunn*, 248, 253 (9).

2. *Admissions.—Insurance.—Insured.—Beneficiary.*—As a general rule admissions of the assured, after receipt of the policy, are not admissible against the beneficiary, and this rule applies to mutual benefit as well as to ordinary insurance.

Grand Lodge, etc., v. Hall, 371, 373 (4).

3. *Declarations.—Res Gestae.—Interurban Railroads.*—Declarations made by the motorman to the conductor of an interurban car, explanatory of a collision which had occurred immediately before, are admissible as part of the *res gestae*.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 545 (9).

4. *Prosecuting Witness's Communicated Threats.—Defense.*—Withdrawing evidence of certain communicated threats, made by the prosecuting witness against defendant, in a prosecution for assault and battery with intent to commit murder, is not reversible where the evidence showed that the defendant was in no imminent peril, that the prosecuting witness made no attack, and there was other evidence of threats remaining in the case, and where the question of intent was found in defendant's favor.

Guy v. State, 691, 693 (3).

5. *Bills and Notes.—Ownership.*—Where the evidence shows that the payee of a note took same as the purchase price of his farm; that he received a mortgage to secure same and recorded it; that it was never assigned; that defendant admitted that the debt was owing and that the payee held such note and mortgage; that payee was a brakeman and was killed in Minnesota and that the note and mortgage could not be found, the court is justified in finding that the payee was the owner thereof at his death.

Embree v. Emerson, 16, 22 (7).

6. *Bonds.—Deputy Marshal.—Appointment.*—Where defendant deputy marshal, in the discharge of the duties of his office, unlawfully beat plaintiff, his official bond is admissible in evidence in an action on such bond for damages for such injury, though there was no record made by the town trustees of his appointment or of his length of term and no approval of his bond, where the evidence introduced justified an inference that such appointment was made, the bond executed and delivered and that the principal therein had acted as deputy marshal for three or four months prior thereto.

State, ex rel., v. Frentress, 245, 246 (1).

7. *Contracts.—Oral Negotiations.*—In an action on a written contract wherein defendant, by a cross-complaint, seeks a reformation thereof, evidence of the oral negotiations leading up to the execution of such written contract is admissible, not

EVIDENCE—Continued.

to contradict such written contract, but to show what the contract really was.

Nichols & Shepard Co. v. Berning, 109, 117 (8).

8. *Nuisance.—Sewers.—Damages for Construction of.*—In an action for damages on account of the maintenance of a nuisance by a city, it is not competent to admit evidence of damages caused by the construction of a sewer across plaintiff's lot, such damages being recoverable only in the proceeding for the construction of such sewer.

City of Huntington v. Stemen, 553, 555 (3).

9. *Nuisance.—Damages.—Opinions.*—In an action for damages for the maintenance of a nuisance by a city, the question "What was the damage sustained by reason of that sewer?", was incompetent because of including damages not properly included in the action and also because of eliciting a mere opinion and not a fact.

City of Huntington v. Stemen, 553, 556 (5).

10. *Incompetent.—Elicited by Appellant.—Objections on Appeal.* Appellant cannot complain of the admission, over objection, of incompetent evidence of its motorman's declarations after the collision complained of, when it elicited similar evidence from another witness on cross-examination.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 547 (13).

11. *Records.—Judicial Notice.*—Appellate courts take judicial notice of their own records, either upon their own motion or at the suggestion of counsel.

Hancock v. Diamond Plate Glass Co., 351, 362 (5).

12. *Judgment for State.—Gaming.—Action by Wife.—Variance.*—A judgment in favor of the State in an action to recover money lost by a husband at gambling is competent evidence to sustain a suit by the wife for the enforcement, in her behalf, of such judgment.

Tyler v. Davis, 557, 569 (8).

13. *Mental Incapacity.—Negligence.—Pleading.*—Evidence in chief of the mental incapacity of the plaintiff is inadmissible, where not pleaded, in a case of negligence.

Roberts v. Terre Haute Electric Co., 664, 668 (1), 672 (1).

14. *Mental Weakness.—Interurban Railroads.—Negligence.*—In an action on behalf of a minor twelve years old for damages for injuries caused by an interurban railroad company, wherein defendant, upon cross-examination, introduced testimony that such minor was of a reckless disposition, it is erroneous to exclude evidence in rebuttal showing that such minor was mentally weak.

Roberts v. Terre Haute Electric Co., 664, 668 (2), 671 (2).

15. *Mortgages.—Records.—Statutes.*—Under §3372 Burns 1901, §2952 R. S. 1881, the record of a mortgage in the recorder's office is admissible in evidence without the production, or proof of loss, of the mortgage itself.

Embree v. Emerson, 16, 22 (6).

16. *Ordinances.—Interurban Railroads.—Negligence.*—In an action for damages on account of running an interurban car at a greater rate of speed than permitted by a municipal ordinance, such ordinance is admissible in evidence.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 545 (8).

EVIDENCE—Continued.

17. *Photographs.—Preliminary Proof.*—Photographs are admissible in evidence after preliminary proof of correctness is made, and it is not material that the witness giving such preliminary proof saw the taking of the photographs.
Huntington Light, etc., Co. v. Beaver, 4, 14 (7).
18. *Expressions of Pain.—Physicians.*—Evidence by a physician of his patient's expressions of pain during treatment is admissible.
Indianapolis, etc., Transit Co. v. Reeder, 262, 264 (3).
19. *Physicians.—Opinions.*—A physician's opinion as to the amount or degree of pain suffered by a patient is admissible in evidence, even though it be a conclusion.
Indianapolis, etc., Transit Co. v. Reeder, 262, 264 (4).
20. *Presumptions.—Bills and Notes.—Payable in Bank.—Ownership.*—In the absence of evidence, there is no presumption that a promissory note was payable in bank, nor that the payee intentionally parted with title or possession.
Embree v. Emerson, 16, 25 (8).
21. *Surveys.—Records.—Field Books.—Boundaries.*—The record of a public survey is *prima facie* evidence of the lines run and corners established for three years after such survey (§8030 Burns 1901, §5955 R. S. 1881), and, if unappealed from, is conclusive evidence thereof after such time, and the fact that the records of such survey were kept in the field book and not in the surveyor's record does not destroy the force thereof.
Wilson v. Powell, 44, 46 (1).
22. *View of Premises by Jury.*—The jury have a right to treat their view of the premises, ordered by the judge, as evidence in the cause.
Fletcher v. Kelly, 254, 261 (3).
23. *Decedents' Estates.—Witnesses.—Executors and Administrators.—Widows.*—The widow, administratrix of her deceased husband's estate, is a competent witness to testify as to where personal property belonging to such decedent was found after his death.
Hartzell v. Hartzell, 481, 486 (4).
24. *Witnesses.—Competency.—Waiver.—Insurance.—Executors and Administrators.*—Where assured agreed in his application for insurance to permit his physician to testify, his administrator cannot object to the competency of such physician to testify.
Metropolitan Life Ins. Co. v. Willis, 48, 53 (4).

EXECUTION—

Of notes, see **BILLS AND NOTES**.

Of deeds, see **DEEDS**.

EXECUTORS AND ADMINISTRATORS—

May maintain partition suit, see **PARTITION**; *Weaver v. Gray*, 35, 41 (2).

Right of discharge upon final settlement, see **DECEDENTS' ESTATES**; *Hartzell v. Hartzell*, 481, 484 (1).

Are competent to testify where decedent's property was found after his death, see **EVIDENCE**, 23; *Hartzell v. Hartzell*, 481, 486 (4).

EXECUTORS AND ADMINISTRATORS—Continued.

Set-Offs.—Execution.—Exemptions.—Where the administrator of the estate of a deceased childless wife, by order of court, sells such wife's real estate to pay debts, one-third of which belongs unconditionally to the husband, such administrator cannot set off a judgment in his favor against such husband for the funeral expenses of such wife where the husband claims the benefit of a householder's exemption, his entire property being of less value than \$600. *Weaver v. Gray*, 35, 42 (3).

EXEMPTIONS—

Cannot be taken from householder by pleading set-off, see **EXECUTORS AND ADMINISTRATORS**; *Weaver v. Gray*, 35, 42 (3).

EXHIBITS—

How made part of bill of exceptions, see **APPEAL AND ERROR**, 8, 9; *Cincinnati, etc., St. R. Co. v. Stahl*, 539, 543 (4), 544 (5).

FACTORY ACT—

Construction of, see **STATUTES**, 2; *Hoffmeyer v. State*, 526, 531 (2).

Complaints for violation of, see **PLEADING**, 44-46; *Muncie Pulp Co. v. Hacker*, 194.

Instructions in case of violation of, see **TRIAL**, 33; *Muncie Pulp Co. v. Hacker*, 194, 206 (5).

What "dust" includes, as used in, see **STATUTES**, 11; *Muncie Pulp Co. v. Hacker*, 194, 205 (4).

For failure to report accidents, see **CRIMINAL LAW**, 6; *Hoffmeyer v. State*, 526, 527 (1).

FEES AND SALARIES—

Collecting back unlawful, see **OFFICERS**, 5; *Zuelly v. Casper*, 186, 191 (3).

Interest collectible on recovery of unlawful fees, see **INTEREST**; *Zuelly v. Casper*, 186, 190 (2).

Settlement by repayment of part only of fees due county by county auditor, not conclusive, see **COMPROMISE AND SETTLEMENT**, 1; *Zuelly v. Casper*, 186, 191 (4).

FORECLOSURE—

See **MORTGAGES**.

FRAUD—

By misrepresenting terms of a contract, see **CONTRACTS**, 21; *Nichols & Shepard Co. v. Berning*, 109, 114 (4).

Opinion of time required to cancel a loan is not, see **BUILDING AND LOAN ASSOCIATIONS**; *Wayne, etc., Loan Assn. v. Gilmore*, 146.

Misrepresentations of sale as constituting, see **ESTOPPEL**; *Williams v. Ketcham*, 506.

FRAUDS, STATUTE OF—

A contract to pay plaintiff wages during disability and to give him employment afterwards, not within statute of frauds, see **CONTRACTS**, 10; *American Quarries Co. v. Lay*, 386, 389 (1).

FRAUDULENT CONVEYANCES—

Consideration.—Gaming.—Evidence.—A conveyance, without consideration, made to the grantor's sister for the purpose of preventing a husband who had lost his money to such grantor at gambling from recovering same, is fraudulent as to the wife who is the beneficiary of a judgment in an action by the State for the recovery thereof. *Tyler v. Davis*, 557, 572 (16).

GAMING—

Sufficiency of indictment for, see **CRIMINAL LAW**, 8; *White v. State*, 95, 97 (1).

1. *Action to Recover Money Lost.—Parties.*—The wife of the person losing money at gambling is not a necessary nor proper relatrix in an action by the State to recover such money.

Tyler v. Davis, 557, 566 (3).

2. *Money Lost.—Beneficiary.—Husband and Wife.—Judgment.*—The wife is the exclusive beneficiary of a judgment recovered by the State for money lost by her husband at gambling.

Tyler v. Davis, 557, 566 (4).

3. *Enforcement of Judgment for Money Lost.—Parties.—Husband and Wife.*—The wife is the proper plaintiff to sue for the enforcement of a judgment recovered by the State for money lost by her husband at gambling.

Tyler v. Davis, 557, 567 (5).

GARNISHMENT—

Common carriers subject to, see **CARRIERS**, 2-5; *Malott v. Johnson*, 678.

GAS AND OIL—

See **CONTRACTS**, 12; **ESTATES**; **LANDLORD AND TENANT**; **LEASES**; **REAL PROPERTY**.

Explosions of gas, complaint for, see **PLEADING**, 38; *Huntington Light, etc., Co. v. Beaver*, 4, 9 (1).

Explosions of gas, liability for, see **NEGLIGENCE**, 3, 4; *Huntington Light, etc., Co. v. Beaver*, 4, 10 (3), 11 (4).

Not mined, are real estate, see **ESTATES**, 1; *Richmond Nat. Gas Co. v. Davenport*, 25, 30 (2).

HARMLESS ERROR—

See **APPEAL AND ERROR**.

HEIRS—

When persons become, see **DESCENT AND DISTRIBUTION**, 11; *Townsend v. Meneley*, 127, 134 (8).

HIGHWAYS—

Complaint for damages received at railroad crossing, see **PLEADING**, 60; *Southern Ind. R. Co. v. Corps*, 586, 591 (3).

Duty of railroad companies to make safe at crossings, see **RAILROADS**, 3, 4; *Southern Ind. R. Co. v. Corps*, 586, 592 (5), (6).

Use of defective, with notice, not conclusive of contributory negligence, see **NEGLIGENCE**, 1; *Southern Ind. R. Co. v. Corps*, 586, 593 (8).

Error in form of judgment establishing highway laid out through enclosures can be raised only on motion to modify, see **APPEAL AND ERROR**, 27; *Baker v. Gowland*, 364, 367 (4).

HIGHWAYS—Continued.

Denial of defendant's petition to establish a road as a public highway, not *res judicata* as to his right to use such way, see JUDGMENT, 9; *McClaskey v. McDaniel*, 59, 70 (1).

1. *Viewers' Reports.—Enclosures.*—Viewers' reports setting out the established line of the proposed highway and stating that certain enclosures were found, the owners of one of which consented to the establishment of the highway and the other refused consent, are in accordance with the statute (§6743 Burns 1901, Acts 1899, p. 116, §1).

Baker v. Gowland, 364, 367 (3).

2. *Twenty Years' User.—Consent.—Statutes.*—In an action involving the question whether a certain way is a public highway, the fact of its public use for twenty years is, as to such action, conclusive of its being a public highway, whether used with or without the consent of adjoining landowners.

McClaskey v. McDaniel, 59, 70 (2).

3. *Use.—Equitable Estoppel.*—Where adjacent owners laid out a lane on the line between them, connecting with the public highway, and kept it open and improved, erected fences on the sides, allowed its use by the public, knew that neighbors were erecting valuable buildings in such manner as to rely upon an outlet thereby, and intending purchasers, after being told by such neighbors that it was public and after observance of all the conditions, in good faith purchased lands, relying upon such appearances and representations, such adjacent owners are equitably estopped from preventing the use of such way by such purchasers.

McClaskey v. McDaniel, 59, 70 (3).

4. *Dedication.—Intention.—Inferences from Conduct.*—The intent necessary to dedicate lands to public use for highway purposes may be inferred from conduct.

McClaskey v. McDaniel, 59, 71 (4).

5. *Dedication.—Acceptance.—Work by Public.*—Acceptance of a highway dedicated to the public may be shown by public use, without any public work on such way, and no specific length of time is necessary to a valid dedication, assent by the landowner, and public use so long that a denial of the right to such use would discommode the public, being all that is necessary to be shown.

McClaskey v. McDaniel, 59, 71 (5).

HOMICIDE—

Indictment for assault and battery with intent need not charge present ability, see INDICTMENT AND INFORMATION, 2; *Guy v. State*, 691, 693 (2).

HUSBAND AND WIFE—

Declaring deed void for suretyship of wife, see PLEADING, 51; *Warner v. Jennings*, 394, 397 (1).

Husband takes one-third of deceased wife's real estate received as a gift from her father, free from wife's creditors, see DESCENT AND DISTRIBUTION, 4; *Weaver v. Gray*, 35, 39 (1).

Punitive damages recoverable in alienation cases, see DAMAGES, 3; *Gregg v. Gregg*, 210, 217 (4).

Wife is exclusive beneficiary of judgment to recover money lost by husband at gambling, see GAMING, 2; *Tyler v. Davis*, 557, 566 (4).

HUSBAND AND WIFE—Continued.

Husband is heir to one-third of deceased wife's real estate received as a gift from her father, see **PARTITION**; *Weaver v. Gray*, 35, 41 (2).

Wife may release favorable provision in antenuptial contract in consideration of a present conveyance to her of property, not grossly unjust to creditors, by way of preferring her in an assignment for the benefit of such creditors, see **ASSIGNMENT FOR BENEFIT OF CREDITORS**; *Clow v. Brown*, 172, 186 (6).

1. *Alienation.—Action for, by Wife.*—A married woman has a right of action against any person who alienates her husband's affections. *Gregg v. Gregg*, 210, 215 (1).
2. *Alienation.—Basis of Action for.*—The basis of an action by the wife for the alienation of her husband's affections is the loss of *consortium*, separation being unnecessary. *Gregg v. Gregg*, 210, 216 (2).
3. *Alienation.—Affections.—Presumptions.—Burden of Proof.*—The presumption is that the husband has affection for his wife, and the burden is on defendant, in a case of alienation, to prove the contrary. *Gregg v. Gregg*, 210, 218 (7).
4. *Contracts Between Themselves.*—A husband may contract directly with his wife and *vice versa* under modern statutes. *Clow v. Brown*, 172, 185 (4).
5. *Descent.—Postnuptial Contracts.*—Where an antenuptial contract fixing the rights of property is abrogated by a postnuptial contract giving the wife a certain sum for the abrogation of such antenuptial contract, which she accepts, the husband at her death inherits under the law. *Clow v. Brown*, 172, 186 (5).
6. *Descent and Distribution.—Inchoate Interests.*—Husbands and wives have contingent interests in each other's property which vest at death, and which may be taken away only by a valid marriage settlement. *Unger v. Mellinger*, 639, 644 (6).
7. *Antenuptial Contracts.—Consideration.*—An antenuptial contract made in consideration of marriage is valid and enforceable. *Unger v. Mellinger*, 639, 644 (7).
8. *Postnuptial Contracts.—Marriage.—Consideration.*—Marriage furnishes no consideration for a postnuptial contract. *Unger v. Mellinger*, 639, 644 (8).
9. *Conveyances of Inchoate Rights.*—The inchoate interest of the husband or wife in the other's property cannot be conveyed without a conveyance of the property of the other. *Unger v. Mellinger*, 639, 645 (9).
10. *Postnuptial Contracts.—Consideration.*—The postnuptial promise to release the wife's property from any claim of marital rights is no legal consideration for a promise by the wife to release her marital rights in the husband's property. *Unger v. Mellinger*, 639, 645 (10).
11. *Postnuptial Contracts.—Executory.*—A postnuptial promise by the husband to release his claim of marital rights in his wife's property in consideration that she release her marital rights in his property is executory and may be disregarded by either party. *Unger v. Mellinger*, 639, 645 (11).
12. *Husband's Duty of Support.*—The husband is charged with the legal duty of supporting his wife to the extent of his ability. *Watson v. Watson*, 548, 551 (3).

ILLEGITIMATE CHILDREN—

Rights of, see DESCENT AND DISTRIBUTION, 6-11; *Townsend v. Meneley*, 127.

INDICTMENT AND INFORMATION—

As to amendment of, see CRIMINAL LAW, 7; *State v. Clark*, 105.

1. *Indorsements.—Grand Jury.—Number Voting for Presentment.—Evidence.*—The return, into open court, by the grand jury, of an indictment indorsed "a true bill" and signed by the foreman is sufficient evidence that at least five of the grand jurors voted for the return of such indictment, that being the number required by law for the return of a valid indictment.

Guy v. State, 691, 693 (1).

2. *Assault and Battery with Intent to Murder.—Present Ability.*—An indictment for assault and battery with intent to commit murder does not need to charge that defendant had the present ability to commit the assault.

Guy v. State, 691, 693 (2).

INFERENCES—

See EVIDENCE.

INJUNCTION—

1. *Cutting Timber.—Life Tenant.*—The owners of the fee may, by injunction, prevent the life tenant from cutting and removing timber from their lands.

Richmond Nat. Gas Co. v. Davenport, 25, 30 (3).

2. *Life Tenants.—Remaindermen.*—The fact that the oil and gas will be exhausted before remaindermen will come into possession is no reason to prevent their enjoining the life tenant from boring wells to take out the gas and oil.

Richmond Nat. Gas Co. v. Davenport, 25, 31 (5).

3. *Municipal Corporations.—Streets.*—Injunction lies to prevent a municipal corporation from taking plaintiff's lands for the purpose of widening its street when no proceedings have been taken to acquire such lands.

Town of Syracuse v. Weyrick, 56, 58 (2).

4. *Appropriation of Lands.—Adequate Remedy at Law.—Trespass.*—The law affords no adequate remedy by an action for damages in a case where a town is threatening to appropriate plaintiff's lands for street purposes, injunction being the only effectual remedy.

Town of Syracuse v. Weyrick, 56, 58 (3).

5. *Use of Schoolhouses.—Township Trustees.*—Injunction may be maintained by the township trustee to prevent a religious organization from using a schoolhouse on Saturdays, Sundays and nights during the term of a public school though such organization was given permission by such trustee under §5999 Burns 1901, §4510 R. S. 1881, to use such house "when unoccupied for common school purposes."

Baggerly v. Lee, 139, 144 (3).

INSTRUCTIONS—

SEE TRIAL.

INSURANCE—

See PLEADING, 29-31.

Admissions of assured, after receipt of policy, not usually admissible against beneficiary, see EVIDENCE, 2; *Grand Lodge, etc., v. Hall*, 371, 373 (4).

INSURANCE—Continued.

Applicant may waive right to question competency of his physician to testify, see *EVIDENCE*, 24; *Metropolitan Life Ins. Co. v. Willis*, 48, 53 (4).

Proof of payment of premiums by others for assured is sufficient, see *TRIAL*, 45; *Grand Lodge, etc., v. Hall*, 371, 372 (3).

1. *Contracts.—Oral.—Validity.*—Oral contracts for insurance are valid. *Posey County Fire Assn. v. Hogan*, 573, 576 (1).
2. *Contracts.—Oral.—Essentials.*—Oral contracts of insurance must contain the essentials of a written contract therefor and must be enforceable by both parties.
Posey County Fire Assn. v. Hogan, 573, 576 (2).
3. *Contracts.—Oral Consideration.*—A promise by assured to pay his proportion of the losses of a mutual fire company is a valid consideration for a parol contract of insurance.
Posey County Fire Assn. v. Hogan, 573, 578 (5).
4. *Contracts.—Oral.*—Where the evidence shows that the husband's guardian had such husband's property insured in defendant mutual fire company; that upon such husband's arrival at majority he conveyed said property to his wife; that his policy was delivered to the secretary of such company, who had power to issue policies, and a notice of such conveyance was given and a request made for a new policy to be issued to the wife, which request was granted, but such new policy was not issued before the loss complained of, such wife can recover for such loss. *Posey County Fire Assn. v. Hogan*, 573, 578 (6).
5. *Mutual Fire.—Appraisement.—By-Laws.*—Where the guardian of a husband has such husband's property insured, and during the life of such policy the husband conveys same to his wife and requests such company to issue a new policy to her, in lieu of the old policy, which the secretary, with power to issue policies, agrees to do, a new appraisement is not necessary, though the by-laws of such company require an appraisement with each policy, no deterioration being shown.
Posey County Fire Assn. v. Hogan, 573, 581 (7).
6. *Mutual Fire.—Payments of Premiums.—Conditions Precedent.*—Assured in a mutual fire company is not required as a condition precedent to pay his premium until a delivery of the policy.
Posey County Fire Assn. v. Hogan, 573, 581 (8).
7. *Suicide.—Presumptions.—Burden of Proof.*—Suicide cannot be presumed from death in an unknown manner where it is possible that such death might be due to negligence, accident or mistake, the burden of proving suicide being upon the insurance company alleging it as a defense.
Equitable Life Ins. Co. v. Hebert, 373, 374 (1).
8. *Suicide.—Evidence.*—Where the evidence showed that decedent was found dead with a bottle partly filled with carbolic acid in his vest pocket and a large bottle of same diluted with water near or under the body; that he had procured such acid for the purpose of a face wash to cure some pimples, the evidence of the presence of such acid in the mouth and stomach being in conflict; that he had previously suffered a sunstroke, and the day he died was excessively warm, the question of suicide was one of fact for the jury.
Equitable Life Ins. Co. v. Hebert, 373, 375 (2).

INSURANCE—Continued.

9. *Mutual Benefit.—Beneficiaries.—Interest.*—Prior to the death of a member of a mutual benefit insurance association, a beneficiary has only a contingent interest.

Grand Lodge, etc., v. Hall, 371, 372 (1).

10. *Warranties.—Breach.—Delivery to Person in Unsound Health.*—Where assured warranted that he was of sound mind, that he was in good health and that he had never had "disease of the brain," and agreed that the policy should be void unless delivered to him while in good health, the facts that he had been insane, and before the delivery of the policy had been pronounced so by a legal inquisition, and taken to an insane asylum where he died two years later are sufficient for the insurer to avoid such policy.

Metropolitan Life Ins. Co. v. Willis, 48, 50 (1).

11. *Warranties.—Breach.—Receipt of Premiums with Knowledge.*—Where the insurer knew of the assured's breach of warranties and that the policy was delivered to assured when not in sound health, but takes premiums with the knowledge of such facts, such insurer cannot avoid such policy.

Metropolitan Life Ins. Co. v. Willis, 48, 51 (2).

12. *Principal and Agent.—Collectors.*—The knowledge of an agent of an insurance company, with authority to "write applications and collect the money" and turn it over to the company, as to insured's breach of warranty is imputable to such company.

Metropolitan Life Ins. Co. v. Willis, 48, 52 (3).

INTEREST—

See **BILLS AND NOTES**.

- Officers.—Unlawful Fees.*—Where public officers retain illegal fees, they are chargeable with six per cent interest thereon to the time of payment.

Zuselly v. Casper, 186, 190 (2).

INTERROGATORIES TO JURY—

See **TRIAL**.

- May show error in giving or refusing instructions to be harmless, see **TRIAL**, 31; *Muncie Pulp Co. v. Hacker*, 194, 209 (11).

- Rejection of requested instruction harmless where answers to, show facts assumed therein to be true, see **TRIAL**, 29; *Huntington Light, etc., Co. v. Beaver*, 4, 15 (10).

INTERURBAN RAILROADS—

See **EMINENT DOMAIN; PLEADING**.

- Must report accidents occurring in repair shops, see **CRIMINAL LAW**, 6; *Hoffmeyer v. State*, 526, 527 (1).

- Power to limit speed of, by ordinance, see **MUNICIPAL CORPORATIONS**, 4; *Cincinnati, etc., St. R. Co. v. Stahl*, 539, 542 (2).

- Backing car over crossing, whether negligence, question for jury, see **TRIAL**, 74; *Roberts v. Terre Haute Electric Co.*, 664, 671 (4).

- Declarations of motorman to conductor explanatory of an accident which had just happened, admissible as part of *res gestae*, see **EVIDENCE**, 3; *Cincinnati, etc., St. R. Co. v. Stahl*, 539, 545 (9).

- Statutes giving right of eminent domain, see **STATUTES**, 9, 10; *Indianapolis, etc., Traction Co. v. Ramer*, 264, 266 (1), 272 (4).

INTERURBAN RAILROADS—Continued.

Acceptance of Ordinances.—Contracts.—Municipal Corporations.

—The acceptance by an interurban railroad company of a municipal ordinance, providing the rate of speed along and over the streets, constitutes a contract and such company is bound thereby.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 542 (1).

INTOXICATING LIQUORS—

As to good-faith sales of, by druggists for medical purposes, see **CRIMINAL LAW**, 9; *De Tarr v. State*, 323, 327 (4).

JUDGMENT—

On former appeal is the law of the case, see **APPEAL AND ERROR**, 36-41.

On appeal, as of date of submission, where party dies pending appeal, see **APPEAL AND ERROR**, 33; *American Quarries Co. v. Lay*, 386, 393 (9).

Appellate Court will render, where justice requires, see **APPEAL AND ERROR**, 46; *Catterson v. Hall*, 341, 350 (7).

Not reversible on appeal where right result was reached, see **APPEAL AND ERROR**, 57; *Posey County Fire Assn. v. Hogan*, 573, 582 (10); *Equitable Trust Co. v. Torphy*, 220, 223 (3).

Appointment of deputy marshal not subject to collateral attack, see **OFFICERS**, 2; *State, ex rel., v. Frentress*, 245, 247 (4).

As to costs, see **COSTS**, 1, 2; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 339 (9), (10).

Of divorce necessarily settles all property rights, see **DIVORCE**, 2; *Watson v. Watson*, 548, 553 (5).

In favor of State to recover money lost at gaming, admissible in favor of wife for enforcement thereof, see **EVIDENCE**, 12; *Tyler v. Davis*, 557, 569 (8).

Motion to modify, requisite to raise question of form of, in highway cases where proposed road passes through enclosures, see **APPEAL AND ERROR**, 27; *Baker v. Gowland*, 364, 367 (4).

For recovery of money lost at gambling, wife, the exclusive beneficiary of, see **GAMING**, 2; *Tyler v. Davis*, 557, 566 (4).

Official acts of notary not subject of collateral attack, see **NOTARIES PUBLIC**, 1; *McNulty v. State*, 612, 615 (1).

May be rendered for excess of award over verdict in condemnation, where award was actually paid by company, see **EMINENT DOMAIN**, 7; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 338 (7).

Performance of conditions in, cannot be objected to by other parties where such performance does not depend upon prior performance by such others, see **CONTRACTS**, 3; *Hartzell v. Hartzell*, 481, 484 (2).

Is *res judicata* as to all matters upon which contested evidence was given, whether covered by allegations of pleading or not, see **APPEAL AND ERROR**, 38; *Hancock v. Diamond Plate Glass Co.*, 351, 361 (4).

JUDGMENT—Continued.

1. *Complaint.—Paragraphs.—Specific Performance.—Damages.*
—Where a complaint consisted of two paragraphs, the first for specific performance and the second for damages, and there was a money judgment only, it affirmatively appears that the judgment rests on the second paragraph.
Grau v. Grau, 635, 638 (2).
2. *Issues.—Debts.—Fraud.—Liens.*—Where a complaint alleged that a certain deed was fraudulent and void as to the plaintiffs, creditors of the grantor, and the answer was a general denial, and a second paragraph which showed that such deed was made to the grantee as a security for a certain debt, a decree declaring a lien for defendant in such sum and for the sale of such property subject to such lien is within the issues.
Clow v. Brown, 172, 179 (1).
3. *Motions in Arrest.—Amended Complaint.—Appeal and Error.*
—Where an amendment of the complaint is permitted after a motion for a new trial is overruled, a motion in arrest filed thereafter will be considered on appeal as directed to the amended complaint.
Gregg v. Gregg, 210, 217 (5).
4. *Motion to Modify.—Conclusions of Law.*—Where the judgment follows the conclusions of law, a motion to modify same presents no question.
Hartzell v. Hartzell, 481, 486 (5).
5. *Motion to Modify.*—Where the finding is general and the judgment follows in accordance therewith, a motion to modify same, setting out as grounds therefor the insufficiency of the evidence to support same and the insufficiency of the cross-complaint as a basis for relief, is properly overruled.
Nichols & Shepard Co. v. Berning, 109, 118 (10).
6. *Motion to Modify.—Parties.*—Where judgment, on an appeal from an award in an interurban railroad condemnation proceeding, is rendered against the landowners for the return of the excess of the award over the judgment on appeal, the lessee is not injured in overruling his motion to modify same, no part of such judgment being against him.
Douglas v. Indianapolis, etc., Traction Co., 332, 338 (6).
7. *Pleading.—Prayer for Lien.—Decree for Transfer of Title.*—Where a complaint for the recovery of converted trust funds prays that a lien be declared therefor on certain real estate, the legal title to which is in a third party, a decree that the title thereto be vested in the trustee is without the issues.
Case v. Collins, 491, 506 (7).
8. *Res Judicata.—Estoppel.*—A judgment in form: "And on motion of plaintiff this cause is dismissed by agreement, at the plaintiff's costs," is not *res judicata* as to the merits of the cause, and defendant is not thereby estopped from filing a new action for the same cause, no fraud being shown and defendant being cognizant of all of the facts.
Zuelly v. Casper, 186, 192 (6).
9. *Res Judicata.—Highways.—Petition to Establish by User.*—The denial by the board of commissioners of defendants' right to have a certain way established as a highway by user is not *res judicata* as to defendants' right to use such way nor as to plaintiff's right to close such way.
McClaskey v. McDaniel, 59, 70 (1).

JUDGMENT—Continued.

10. *Personal. — Nonresidents. — Waiver.* — Where nonresidents enter a full appearance and file pleas in bar in an interurban condemnation proceeding, personal judgments may be rendered against them, such appearance being a waiver of the right to question jurisdiction.

Douglas v. Indianapolis, etc., Traction Co., 332, 339 (8).

JUDICIAL NOTICE—

See EVIDENCE.

JURISDICTION—

See COURTS.

Mandamus, Appellate Court has not, see APPEAL AND ERROR, 61; *Funk v. State, ex rel.*, 231.

Appellate Court does not have, in cases involving only a money demand for not over \$50, see APPEAL AND ERROR, 34; *Yakey v. Leich*, 393, 394 (1).

JURY—

Invasion of province of, see TRIAL, 42-44.

Instructions invading province of, see TRIAL, 34, 35; *Southern Ind. R. Co. v. Corps*, 586, 594 (9); *Huntington Light, etc., Co. v. Beaver*, 4, 15 (9).

Delivery of a deed, usually a question for, see DEEDS, 8; *Fifer v. Rachels*, 275, 277 (2).

Time covered by phrase "during disability" in contract for payment of wages is question for, see CONTRACTS, 11; *American Quarries Co. v. Lay*, 386, 392 (7).

Whether backing interurban car over street is negligence, question for, see TRIAL, 74; *Roberts v. Terre Haute Electric Co.*, 664, 671 (4).

Cause of collision, usually question for, see TRIAL, 77; *Evansville, etc., R. Co. v. Mills*, 598, 603 (3).

Whether master was guilty of negligence in failing to furnish properly cleated bottles for handling dangerous acids, question for jury, see APPEAL AND ERROR, 66; *Columbian, etc., Stamping Co. v. Burke*, 518, 523 (6).

View of premises, evidence to be considered, see EVIDENCE, 22; *Fletcher v. Kelly*, 254, 261 (3).

Question of negligence for, see MASTER AND SERVANT, 8; *Southern Ind. R. Co. v. Baker*, 405, 410 (4).

Appreciation of risk by servant, question for, see MASTER AND SERVANT, 2; *Chicago, etc., R. Co. v. Bryan*, 487, 490 (2).

Proximate cause, question for, see NEGLIGENCE, 5; *Cleveland, etc., R. Co. v. Patterson*, 617, 623 (6).

Questions of Fact for.—Invasion of Such Right by Courts.—Under the English and American systems of jurisprudence, questions of fact are for the jury, proper instructions being given; and an invasion of such right by the trial or appellate courts tends to arbitrariness of decisions and illogical standards. *Cincinnati, etc., St. R. Co. v. Stahle*, 539, 546 (12).

LANDLORD AND TENANT—

Actions on gas-and-oil leases, see PLEADING, 39; *Ramage v. Wilson*, 532, 536 (2).

Lessees, with knowledge of a prior lease, take subject thereto, see NOTICE, 2; *American, etc., Glass Co. v. Indiana, etc., Co.*, 439, 448 (9).

1. *Leases.—Gas and Oil.—Accepting Rentals.—Election.*—Where a lease gives the lessee twelve years in which to develop the gas and oil under the lessor's lands, certain rentals to be paid annually therefor, the acceptance of the fourteenth annual rental does not alone extend such lease for another term of twelve years, but it gives the lessee the right to reasonable notice for the development of such lands before the lessor can terminate such lease, such acceptance being an election not to claim a termination of such lease at the end of the twelfth year.

American, etc., Glass Co. v. Indiana, etc., Co., 439, 444 (2).

2. *Leases.—Termination.—Reasonable Notice of.—Question for Court or Jury.*—What is a reasonable time for the lessor in a gas-and-oil lease to give his lessee in which to develop the lands is usually a question of fact for the jury, but where the facts are undisputed and the motives of the parties do not enter into consideration, the question is one of law for the court.

American, etc., Glass Co. v. Indiana, etc., Co., 439, 445 (3).

3. *Leases.—Termination.—Reasonable Time.—What Is.*—A reasonable time to give the lessee to develop gas and oil on the lessor's lands is such "time that preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer."

American, etc., Glass Co. v. Indiana, etc., Co., 439, 446 (4).

4. *Leases.—Gas and Oil.—Rentals.—Payment.*—The payment of the fourteenth annual rental as provided in the lease of plaintiff's oil-and-gas rights secures to the lessee, during such year, the right to develop such gas or oil, and the lessor cannot, during such year, terminate such lease.

American, etc., Glass Co. v. Indiana, etc., Co., 439, 446 (5).

5. *Leases.—Termination.—Leasing to Others.*—Where the lessor in a gas-and-oil lease gave the lessee twelve years within which to develop the lands, but accepted the fourteenth annual payment of rent, he cannot, by leasing such lands to others, terminate lessees's lease during the time covered by such payment, no reasonable notice to develop such lands having been given.

American, etc., Glass Co. v. Indiana, etc., Co., 439, 447 (6).

6. *Leases.—Termination by Lessor.—Delay Thereafter by Lessee.*—Delay in the prosecution of the prescribed work, after the lessor had declared a forfeiture of the lease, cannot be considered against such lessee in an action to enforce such forfeiture.

American, etc., Glass Co. v. Indiana, etc., Co., 439, 448 (7).

7. *Gas-and-Oil Leases.—Release.—Parol.*—A lease granting the gas and oil under a certain tract conveys an interest in the real estate, and it cannot be released by parol.

Ramage v. Wilson, 532, 537 (3).

8. *Gas-and-Oil Leases.—Contracts.—Termination.*—Where the landlord contracted with lessee that if no gas or oil well was completed in thirty days the grant should be void unless the lessee should pay \$143, quarterly in advance, for each year of delay, and such lessee within the thirty days paid the lessor

LANDLORD AND TENANT—Continued.

for a certain extension of time during which he sank a well but found nothing, and removed most of the machinery, such lease became void, and the fact that the lessee entered upon such land three years later and, without the payment of such rents, or any other agreement, sank a paying well, did not revive such lease. *Zeigler v. Dailey*, 240.

9. *Gas-and-Oil Leases. — Assignees. — Personal Liability. — Receivers. — Conveyances.*—Where a receiver of a corporation, with the written consent of all parties concerned, petitioned the court to permit such receiver to transfer to a new corporation all of the property and assets of the old on condition that such new corporation discharge certain liabilities against the old corporation and the receiver, which transfer was ordered made and the transfer confirmed, and a part of the assets was a gas-and-oil lease involving a liability for certain payments by the lessee or assignee, and such lease was afterwards assigned to defendants, they became personally liable for such payments, whether they took possession and complied with other conditions of such lease or not, their chain of title being perfect and such covenants running with the title.

Robyn v. Pickard, 161.

10. *Contracts. — Gas-and-Oil Leases. — Right to Determine.*—Where the landlord grants to his lessee, "its successors and assigns," the exclusive right to explore for gas and oil on his land, such lessee or assigns to drill a well within six months or thereafter furnish the landlord free gas until said well is drilled or the property reconveyed or the lease forfeited by its terms, and the assignee did not put down such well within the time but did furnish such free gas which was accepted, the landlord could not, without a demand and the giving to such assignee of a reasonable time thereafter to sink a well, arbitrarily refuse to take such free gas and terminate such contract.

Indiana Rolling Mill Co. v. Gas Supply, etc., Co., 154, 158 (2).

11. *Leases.—Gas-and-Oil Rights.*—The rights of the parties to a lease, which provides for an annual rental payment until wells are sunk and for a different payment after development, are not the same before and after development, the right of the landlord to terminate the lease for failure to develop not being available after development. *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346, and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124, explained.

Hancock v. Diamond Plate Glass Co., 351, 359 (2).

12. *Leases.—Gas and Oil.—Part Performance.*—Where a landlord leases his land, the lessee agreeing to pay an annual rental until the land is developed and after development to pay a different sum, such lessee agreeing also to furnish to such landlord free gas, the furnishing of such gas, where no well was ever drilled and no offer made to drill one, does not constitute the taking possession for the purposes of the lease nor is it a part performance of the contract.

Hancock v. Diamond Plate Glass Co., 351, 362 (6).

13. *Leases.—Contracts.—Gas and Oil.*—Where the lessor granted to his lessee the right to the gas and oil under his lands "for a term of twelve years and so long thereafter as petroleum, gas or mineral substances can be procured in paying quantities, or the payments hereinafter provided for are made according to

LANDLORD AND TENANT—Continued.

the terms and conditions attaching thereto," such lessee has twelve years in which to develop such land, provided the annual payments are made, at the end of which time, if the lands remain undeveloped, the lease terminates by its own terms.

American, etc., Glass Co. v. Indiana, etc., Co., 439, 443 (1).

LEASES—

See **LANDLORD AND TENANT**.

Ambiguity in gas-and-oil lease, see **CONTRACTS**, 12; *Ramage v. Wilson*, 532, 536 (1).

LEGACIES—

See **WILLS**.

LEGISLATURE—

May prescribe manner of making the record and saving exceptions in a cause, see **APPEAL AND ERROR**, 42; *Baker v. Gowland*, 364, 368 (5).

LIENS—

Assumption of payment of, see **DEEDS**, 2; *Mullen v. Clifford*, 435, 438 (3).

LIFE TENANCY—

See **ESTATES**.

LIMITATION OF ACTIONS—

Officers.—Individual Actions for Recovery of Illegal Fees.—A suit by taxpayers against a county auditor individually for the recovery of illegal fees retained, is not barred by the five-year statute of limitations prescribed for certain actions by §294 Burns 1901, §293 R. S. 1881.

Zuelly v. Casper, 186, 193 (10).

MALICE—

Must be alleged in action by wife against mother-in-law for alienation, see **PLEADING**, 1; *Gregg v. Gregg*, 210, 217 (3).

MALICIOUS ABUSE OF PROCESS—

See **PROCESS**.

MALICIOUS PROSECUTION—

Complaint in actions for, see **PLEADING**, 40, 41; *Whitesell v. Study*, 429.

Civil Action.—Elements.—Where plaintiff instituted a civil action against defendant maliciously and without probable cause, and such action terminated in defendant's favor, a civil action lies against such plaintiff for damages, and it is immaterial whether such action was begun by process of attachment or by summons.

Whitesell v. Study, 429, 432 (2).

MARRIAGE—

No consideration for postnuptial contract, see **HUSBAND AND WIFE**, 8; *Unger v. Mellinger*, 639, 644 (8).

Not a consideration for postnuptial contract, see **CONTRACTS**, 15; *Clow v. Brown*, 172, 182 (2).

MARSHALS—

For appointment of deputy, see MUNICIPAL CORPORATIONS, 3;
State, ex rel., v. Frentress, 245, 247 (2).

MASTER AND SERVANT—

See PLEADING; TRIAL.

Contract by master to become responsible for injuries caused by defective ways, works and machinery, valid, see CONTRACTS, 20; *Cleveland, etc., R. Co. v. Patterson*, 617, 625 (11).

1. *Railroads.—Assumed Risk.*—Where the plaintiff's decedent, defendant's brakeman over a year, stood by the side of the track and signaled the engineer of the freight-train to back three cars onto the side-track, and the engineer slowly backed such cars according to signals, and the appliances on the door of one of such cars, in plain view of decedent, caught his coat and dragged him between such car and the platform, inflicting mortal injuries, there being nothing to prevent decedent from stepping back, the injury resulted from an assumed risk and there can be no recovery therefor.

Chicago, etc., R. Co. v. Bryan, 487, 489 (1).

2. *Assumed Risk.—Appreciation of Dangers.—When for Jury.—When for Court.*—Risks assumed by the servant must be appreciated, and such fact is a question for the jury where there is a conflict in the evidence, but where but one conclusion can be drawn from the evidence, it becomes a question of law for the court.

Chicago, etc., R. Co. v. Bryan, 487, 490 (2).

3. *Assumption of Risk.—Basis of.—Contracts.*—The doctrine of assumed risk in relation to known defects depends upon an implied contract deduced from the facts, but where there is an express one, such implied contract is necessarily excluded.

Cleveland, etc., R. Co. v. Patterson, 617, 624 (9).

4. *Assumption of Risk.—Evidence.*—Where an engineer is assured by the railroad company that his engine, against the running of which he has protested, is all right and that the company is responsible for what happens, such engineer does not assume the risks of the defects against which he has protested, and the company becomes responsible therefor.

Cleveland, etc., R. Co. v. Patterson, 617, 624 (10).

5. *Employers' Liability Act.—Conforming to Orders.*—Where a servant was employed to do certain work under the direction of a foreman, a part of which was to do certain things preparatory to turning a heavy machine, in the doing of which he was injured by reason of a negligent order of the foreman, he is considered in the doing of such things as conforming to the orders of such foreman. *Grand Rapids, etc., R. Co. v. Pettit*, 27 Ind. App. 120, distinguished.

Clear Creek Stone Co. v. Carmichael, 413, 417 (3), 420 (3).

6. *Railroads.—Negligence.—Evidence.*—Where the evidence shows that the plaintiff, an employe of defendant railroad company, was riding on a construction train to his place of work; that such train, in charge of the conductor and engineer, ran into a coal train causing plaintiff's injuries and that plaintiff did not know such coal train was on the track, a verdict for plaintiff was supported by the evidence.

Southern Ind. R. Co. v. Baker, 405, 408 (2).

MASTER AND SERVANT—Continued.

7. *Railroads.—Collisions.—Presumption.*—A presumption of negligence from a collision of two trains on defendant's road does not arise in favor of an injured servant.
Southern Ind. R. Co. v. Baker, 405, 410 (3).
8. *Railroads.—Negligence.—Collisions.*—In an action by a servant against a railroad company for damages growing out of a collision of two trains, it is not necessary to prove that the train with which plaintiff's train collided was operated by defendant, the question of defendant's negligence being a question for the jury upon all of the evidence.
Southern Ind. R. Co. v. Baker, 405, 410 (4).
9. *Works, Ways and Machinery.—Repairs.*—It is the master's duty to use reasonable care to provide servants safe tools and appliances with which to work.
Cleveland, etc., R. Co. v. Patterson, 617, 621 (1).
10. *Works, Ways and Machinery.—Defects Causing Exposure of Servant to Other Dangers.*—A railroad company furnishing its engineer an engine with windows boarded up so that such engineer was compelled to hold his head near a dangerous water-gauge in order to see the train and the signals is liable for injuries caused by such gauge, such defective boarding being a proximate cause of the injury, the fact that other causes contributed thereto being no defense.
Cleveland, etc., R. Co. v. Patterson, 617, 621 (3).
11. *Works, Ways and Machinery.—Negligence.—Contributory.*—The servant who works with tools known to be defective cannot, as a matter of law, be held guilty of contributory negligence.
Cleveland, etc., R. Co. v. Patterson, 617, 626 (12).
12. *Works, Ways and Machinery.—Defective by Use.—Care Required.*—Where the master installs modern and safe machinery, and by usage such machinery becomes insecure and dangerous, the master is not liable unless he knows or by the exercise of reasonable care should know such machinery is insecure and dangerous.
Cleveland, etc., R. Co. v. Snow, 646, 653 (6).
13. *Negligence.—Works, Ways and Machinery.—Duty to Keep in Repair.*—The master is liable to his servant for injuries caused by such master's failure to exercise ordinary care in keeping free from defects his works, ways and machinery.
Columbian, etc., Stamping Co. v. Burks, 518, 520 (1).
14. *Latent Defects.*—Reasonable care requires the master, but not the servant, to search for latent defects.
Columbian, etc., Stamping Co. v. Burks, 518, 521 (3).
15. *Works, Ways and Machinery.—Safety.*—The servant has the right to rely upon the safety of the works, ways and machinery unless defects are obvious.
Columbian, etc., Stamping Co. v. Burks, 518, 522 (5).

MAXIMS—

See WORDS AND PHRASES.

Ejusdem generis: Of the same kind or nature; *White v. State*, 95, 98.

MISREPRESENTATIONS—

See FRAUD.

MONOPOLIES—

Contract to purchase a company's entire output of sash weights for one year is not void because monopolistic, see **CONTRACTS**, 17, 18; *Over v. Byram Foundry Co.*, 452, 455 (3), 457 (4).

MORTGAGES—

Declaring deeds to be, see **PLEADING**, 51; *Warner v. Jennings*, 394, 397 (1).

Time of listing for taxation, see **TAXATION**, 2; *Corr v. Martin*, 655, 659 (5).

Misrepresentations of time required in which to pay, see **BUILDING AND LOAN ASSOCIATIONS**; *Wayne, etc., Loan Assn. v. Gilmore*, 146.

Failure to file against estate waives right to share in personality thereof, and holder must rely upon property covered thereby for payment, see **DESCENT AND DISTRIBUTION**, 2; *St. Joseph County Sav. Bank v. Randall*, 402, 404 (2).

Plaintiff cannot be heard to complain where decree of foreclosure was entered for only that part of mortgage actually borrowed by a married woman for her own use, see **APPEAL AND ERROR**, 43; *Equitable Trust Co. v. Torphy*, 220, 222 (2).

As to estoppel from asserting a defense to, for fraud, see **ESTOPPEL**; *Williams v. Ketcham*, 506.

Record of, admissible without proof of loss of mortgage, see **EVIDENCE**, 15; *Embree v. Emerson*, 16, 22 (6).

Complaint alleging that defendant "executed" mortgage shows delivery, see **PLEADING**, 50; *Embree v. Emerson*, 16, 21 (3).

MOTIONS—

In arrest, when considered as applying to amended complaint, see **JUDGMENT**, 3; *Gregg v. Gregg*, 210, 217 (5).

To modify judgment following conclusions of law, presents no question, see **JUDGMENT**, 4; *Hartzell v. Hartzell*, 481, 486 (5).

To modify judgment, for insufficiency of evidence, presents no question, see **JUDGMENT**, 5; *Nichols & Shepard Co. v. Berning*, 109, 118 (10).

To modify judgment, not available for party against whom no judgment was rendered, see **JUDGMENT**, 6; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 338 (6).

To quash return on summons, see **PROCESS**.

To quash sheriff's return, on special appearance, see **PROCESS**, 1; *Tyler v. Davis*, 557, 566 (1).

To make more specific, see **PLEADING**, 23, 64, 66.

To make additional special findings, not recognized, see **TRIAL**, 60; *Tyler v. Davis*, 557, 570 (11).

MUNICIPAL CORPORATIONS—

Appointment of deputy marshal, see **OFFICERS**, 1-4; *State, ex rel., v. Frentress*, 245.

Have the right to condemn lands for widening of streets, see **EMINENT DOMAIN**, 12; *Town of Syracuse v. Weyrick*, 56, 58 (1).

MUNICIPAL CORPORATIONS—Continued.

As to statute for construction of sidewalks, see **STATUTES**, 12; *Marion Trust Co. v. City of Indianapolis*, 672, 678 (4).

Obstructions of streets, complaint for damages caused by, see **PLEADING**, 52-57; *Town of Royal Center v. Bingaman*, 626.

May be enjoined from taking private property for street purposes, see **INJUNCTION**, 3; *Town of Syracuse v. Weyrick*, 56, 58 (2).

Ordinance limiting speed of railroad admissible in actions of negligence for violating same, see **EVIDENCE**, 16; *Cincinnati, etc., St. R. Co. v. Stahle*, 539, 545 (8).

Street assessments not covered by a prior warranty deed, see **DEEDS**, 1; *Mullen v. Clifford*, 435, 437 (2).

1. *Street Assessments.—Statutes for.—Strict Construction.*—At common law municipal corporations have no right to assess frontagers for the payment of the cost of street improvements, and statutes granting such right are construed strictly in favor of such frontagers and against such corporations.

Marion Trust Co. v. City of Indianapolis, 672, 676 (2).

2. *Street Assessments.—Liens on Back-Lying Lots.—Statutes.*—Under §4290 Burns 1901, Acts 1889, p. 237, §3, a lien for street improvements is given on the back-lying lots, distant not exceeding 150 feet from the improved street, and the assessment on the front lot conditionally attaches, without additional assessment, to such back-lying lots for any sums not paid by the sale of, or the owner of, the front lot.

Mullen v. Clifford, 435, 437 (1).

3. *Towns.—Trustees.—Deputy Marshal.—Appointment.*—The board of trustees of a town have the power to appoint a deputy marshal (§§4350, 4351 Burns 1901, Acts 1893, p. 293, §§1, 2).

State, ex rel., v. Frentress, 245, 247 (2).

4. *Ordinances.—Speed of Interurban Cars.*—A municipal ordinance limiting the speed of interurban cars upon the street crossings to four miles per hour and between crossings to six miles per hour is not unreasonable.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 542 (2).

5. *"Sidewalks."—Meaning of.—Presumptions.*—A "sidewalk" means primarily a foot way along the side of a street, and the presumption is that such meaning is intended when such word is used in a statute.

Marion Trust Co. v. City of Indianapolis, 672, 677 (3).

6. *Pavements.—Patents.—Competitive Bidding.*—Where one person has the exclusive right to make, sell and use a patented pavement, there cannot be "competitive bidding" for a contract to use such patented article.

Monaghan v. City of Indianapolis, 280, 285 (2).

7. *Streets.—Construction.—Statutes.—Mandatory.*—It has been the settled purpose in this State to let contracts for the construction of streets to the lowest and best bidder when the cost thereof was chargeable to the property owners, and the provisions of the statutes relating thereto are mandatory.

Monaghan v. City of Indianapolis, 280, 285 (3).

8. *Streets.—Construction.—Statutes.—Patents.*—While it will be presumed that officers will do their duty, still, where a municipal corporation has not the power to contract for a pat-

MUNICIPAL CORPORATIONS—Continued.

ented pavement because competitive bidding cannot be had thereon, such corporation's compliance with all of the other provisions of the statutes relating thereto does not avail to make such contract valid.

Monaghan v. City of Indianapolis, 280, 286 (4).

9. *Streets.—Construction.—Statutes.—Provisions.*—Where a statute giving a municipal corporation the power to construct streets at the expense of the frontagers provides for competitive bidding, it impliedly excludes the use of a patented pavement on which there can be no competitive bidding.

Monaghan v. City of Indianapolis, 280, 286 (5).

10. *Streets.—Construction.—Competition.*—A municipal corporation has no power to contract for the use of a pavement, the materials of which are under the control of one person, whether such materials be patented or not, where the law requires competitive bidding.

Monaghan v. City of Indianapolis, 280, 287 (6).

11. *Streets.—Construction.—Right of Frontagers to Select Kind.*—Where a statute gives frontagers the right to select "of the accepted kinds of modern city improvement" the kind of pavement they desire they cannot select a patented pavement on which there can be no competitive bidding, the statute requiring competitive bidding.

Monaghan v. City of Indianapolis, 280, 288 (7).

12. *Streets.—Construction.—Competitive Bidding.—Waiver.*—Where a statute requires competitive bidding in the construction of streets, a municipal corporation cannot waive such provision, nor can a majority of the frontagers, although such statute gives such majority the right to make their selection of the kind of pavement from "the accepted kinds of modern city improvement." *Monaghan v. City of Indianapolis*, 280, 288 (8).

13. *Streets.—Construction.—Frontagers' Expense.*—In deciding that a municipal corporation cannot let a contract, at the frontagers' expense, for the construction of a street made by the use of a patented pavement, on which there can be no competitive bidding, the statute requiring such bidding, the court does not hold that such municipal corporation cannot, acting for itself, use patented articles for municipal purposes.

Monaghan v. City of Indianapolis, 280, 290 (9).

14. *Streets.—Construction.—Statutes.—Right to Bid.*—Where a statute requires competitive bidding for the construction of streets, outsiders have no "right" to bid, within the meaning of such statute, where such streets are to be made from patented material and one person owns the exclusive right to make and use same. *Monaghan v. City of Indianapolis*, 280, 291 (10).

15. *Streets.—Construction.—Patents.—Use of.—Restrictions.—Competition.*—Where the patentee of a pavement granted to all the right, at a certain price, to use his pavement, reserving to himself the right to decide whether the user was capable and competent to do the work, there can be no competitive bidding for the construction of a street, such patentee virtually reserving the right to choose the bidder.

Monaghan v. City of Indianapolis, 280, 293 (12).

MUNICIPAL CORPORATIONS—Continued.

16. *Streets. — Construction. — Patents. — Market Price.*—Where the patentee has established a regular market price for his patented pavement, or he relinquishes his right to use the patent and place bidders on equal terms, municipal corporations can contract for the use of such patented pavement in the construction of its streets.

Monaghan v. City of Indianapolis, 280, 293 (13).

NEGLIGENCE—

See MASTER AND SERVANT; RAILROADS; TRIAL; 68-74; TELEGRAPHS AND TELEPHONES, 1-4; *Kagy v. Western Union Tel. Co.*, 73.

Burden of proof to show contributory negligence is on defendant, see TRIAL, 7; *Southern Ind. R. Co. v. Corps*, 586, 591 (2).

Contributory, is a defense, see TRIAL, 68; *New Castle Bridge Co. v. Doty*, 84, 86 (1).

Responsibility for, by contract, see CONTRACTS, 20; *Cleveland, etc., R. Co. v. Patterson*, 617, 625 (11).

In relying upon representations in execution of contracts, see CONTRACTS, 21; *Nichols & Shepard Co. v. Berning*, 109, 114 (4).

Prospective pain, recovery for, in cases of, see DAMAGES, 2; *Muncie Pulp Co. v. Hacker*, 194, 208 (9).

Shortening of life, damages for, not recoverable in negligence cases, see TRIAL, 36; *Muncie Pulp Co. v. Hacker*, 194, 208 (8).

Proof of one act of, sufficient, where several are alleged, see TRIAL, 72; *Muncie Pulp Co. v. Hacker*, 194, 207 (6).

When contributory, question for jury, see APPEAL AND ERROR, 68; TRIAL, 69, 71.

When mental weakness admissible in cases of, see EVIDENCE, 13, 14; *Roberts v. Terre Haute Electric Co.*, 664.

Necessary to negative contributory, in action for damages to property, see PLEADING, 32-34; *Cincinnati, etc., St. R. Co. v. Klump*, 660.

Allegations in action against town for damages caused by horse's taking fright at an obstruction of street, see PLEADING, 56; *Town of Royal Center v. Bingham*, 626, 630 (5).

Not guilty of contributory, because riding in freight-car to care for stock, see RAILROADS, 5; *Evansville, etc., R. Co. v. Mills*, 598, 605 (6).

In master's failing to furnish servant with properly cleated bottles for handling dangerous acid, see APPEAL AND ERROR, 66; *Columbian, etc., Stamping Co. v. Burke*, 518, 523 (6).

Indiana procedure governs action brought in such State for negligence, though negligence was committed in another state, see ACTION, 3; *Cincinnati, etc., St. R. Co. v. Klump*, 660, 662 (3).

Whether backing interurban car over street is, question for jury, see TRIAL, 74; *Roberts v. Terre Haute Electric Co.*, 664, 671 (4).

1. *Contributory. — Highways. — Defects. — Notice.*—Plaintiff was not guilty of contributory negligence, as a matter of law, for using a defective highway with knowledge thereof, unless such

NEGLIGENCE—Continued.

defects were so dangerous as to forbid the highway's use by persons using ordinary care.

Southern Ind. R. Co. v. Corps, 586, 593 (8).

2. *Proximate Cause.—Anticipation of Injuries.*—Actionable negligence must be such that an ordinarily prudent person would anticipate that some person in the exercise of a legal right might be injured thereby, and not that the precise injury sued for should happen.

Huntington Light, etc., Co. v. Beaver, 4, 10 (2).

3. *Proximate Cause.—Gas Explosion.*—Where plaintiff, the tenant of a house, requested defendant gas company to turn on the gas, and defendant after turning on the street valve discovered a leak between such valve and the house valve, and then turned off the house valve awaiting repairs by the owner, the fact that the plumber ignited the leaking gas inadvertently does not prevent defendant's liability, since where injury results from two negligent acts, both actors are liable.

Huntington Light, etc., Co. v. Beaver, 4, 10 (3).

4. *Turning on Gas.—Leaks.—Failure to Turn Off.*—Where a gas company turns on its gas with the knowledge that the plumbing has lately been tested and found safe, but such company ascertain that there is a leak therein, a failure by such company to turn off such gas constitutes negligence.

Huntington Light, etc., Co. v. Beaver, 4, 11 (4).

5. *Proximate Cause.—Question for Jury.*—Whether an injury was proximately caused by the alleged negligence is primarily a question of fact for the jury.

Cleveland, etc., R. Co. v. Patterson, 617, 623 (6).

6. *Proximate Cause.—Intervening Agent.—When a Defense.*—Defendant can escape liability for his negligence on the ground of an intervening agent only when he could not reasonably anticipate the presence of such agent. *New York, etc., R. Co. v. Perrigney*, 138 Ind. 414, and *McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, distinguished.

Cleveland, etc., R. Co. v. Patterson, 617, 623 (7).

NEGOTIABLE INSTRUMENTS—

See **BILLS AND NOTES.**

NEW TRIAL—

Motion for, not considered on appeal, where evidence is not in record, see **APPEAL AND ERROR**, 44; *Grau v. Grau*, 635, 639 (5).

Motion for, because of insufficient evidence, properly questions, on appeal, the weight of the evidence, see **APPEAL AND ERROR**, 5; *Unger v. Mellinger*, 639, 643 (5).

1. *Criminal Law.—Evidence.—Statutes.*—Under subdivision nine, §1911 Burns 1901, §1842 R. S. 1881, insufficiency of the evidence is not a ground for a new trial in a criminal case.

De Tarr v. State, 323, 324 (1).

2. *Criminal Law.—Evidence.—Statutes.*—That the decision is contrary to law, is a ground for a new trial in a criminal case under subdivision nine, §1911 Burns 1901, §1842 R. S. 1881, and a failure of the proof to sustain the charge renders the decision "contrary to law." *De Tarr v. State*, 323, 324 (2).

NEW TRIAL—Continued.

3. *Contract Actions.—Excessive Damages.*—That the damages are excessive, is not a ground for a new trial in actions founded upon contract. *American Quarries Co. v. Lay*, 386, 391 (3).
4. *Contract Actions.—Recovery too Large.*—That the amount of recovery is too large, is a good ground for a new trial in actions founded on contract.
American Quarries Co. v. Lay, 386, 391 (4).
5. *Evidence.—Disclaimer.*—A defendant refusing to file a disclaimer and filing an affirmative answer cannot complain on appeal that the evidence was insufficient to sustain a judgment against him when there was some evidence to support such judgment.
Tyler v. Davis, 557, 572 (15).
6. *Railroads.—Negligence.—Evidence.—Conjectures.*—A new trial cannot be granted because of insufficient evidence, where the plaintiff engineer was injured by an explosion of a water-gauge, near which he was holding his head to see his train and brakemen's signals because the windows of his cab had been boarded, the defendant's contention that he might have been hurt though such windows were in good condition being purely conjectural.
Cleveland, etc., R. Co. v. Patterson, 617, 622 (4).
7. *As of Right.—Injunction.—Quieting Title.—Statutes.*—A new trial as of right under §1076 Burns 1901, §1064 R. S. 1881, is not demandable in a suit for injunction where plaintiff also incidentally asks to have his title quieted.
Indiana Rolling Mill Co. v. Gas Supply, etc., Co., 154, 160 (4).
8. *Nuisance.—Damages.—Evidence.*—In an action for damages for the maintenance of a nuisance, where there is no legal evidence upon which to base a verdict for plaintiff, a new trial should be granted. *City of Huntington v. Stemen*, 553, 556 (6).

NON EST FACTUM—

See PLEADING.

NOTARIES PUBLIC—

1. *De Facto.—Official Acts.—Abatement.—Collateral Attack.*—Where a notary public who accepts the office of deputy prosecuting attorney and who, after the expiration of such latter office, swears affiant to an affidavit charging defendant with the commission of a crime, such official act whether *de jure* or *de facto* cannot be attacked by a plea in abatement to such criminal charge.
McNulty v. State, 612, 615 (1).
2. *Attorney and Client.—Attorney Swearing Client.—Abatement.*—A plea in abatement does not lie to the charge of misdemeanor because the notary swearing affiant to the affidavit charging such crime was also attorney for the prosecution.
McNulty v. State, 612, 616 (2).

NOTICE—

Courts will take notice, without motion, of want of jurisdiction, see APPEAL AND ERROR, 35; *Yakey v. Leich*, 393, 394 (2).

Served on appellee's attorney in vacation appeal, sufficient, unless appellant knows of such attorney's discharge, see APPEAL AND ERROR, 48; *Rose v. Owen*, 125.

NOTICE—Continued.

- Must allege, in action against town for damages caused by obstruction of street, see PLEADING, 54; *Town of Royal Center v. Bingaman*, 626, 629 (3).
- Surety on note must have, to be liable where principal and payee extend time of payment of note, see BILLS AND NOTES, 18; *Weaver v. Prebster*, 582, 584 (1).
- Constructive, sufficient to establish master's negligence, see PLEADING, 48; *Clear Creek Stone Co. v. Carmichael*, 418, 417 (2), 419 (2).
- By servant, of defects, not necessary to negative in cases under factory act, see PLEADING, 46; *Muncie Pulp Co. v. Hacker*, 194, 204 (8).
- Of defects, allegations of, see PLEADING, 43; *Columbian, etc., Stamping Co. v. Burke*, 518, 521 (2).
- Of defects in highway, not conclusive of contributory negligence in use of, see NEGLIGENCE, 1; *Southern Ind. R. Co. v. Corps*, 586, 593 (8).
- Of defective works, ways and machinery, not conclusive of contributory negligence, see MASTER AND SERVANT, 11; *Cleveland, etc., R. Co. v. Patterson*, 617, 626 (12).
- What is reasonable, to determine gas-and-oil lease, see LANDLORD AND TENANT, 2, 3; *American, etc., Glass Co. v. Indiana, etc., Co.*, 439, 445 (3), 446 (4).
1. *Public Records.*—Lessees must take notice of recorded leases and their assignments.
American, etc., Glass Co. v. Indiana, etc., Co., 439, 448 (8).
 2. *Landlord and Tenant.*—*Prior Leases.*—*Subsequent Lessees.*—Subsequent lessees, with knowledge of existing prior leases, take subject thereto.
American, etc., Glass Co. v. Indiana, etc., Co., 439, 448 (9).

NUISANCE—

Damages.—How Proved.—A complaint for damages for the destruction of property by a nuisance is proved by evidence showing the depreciation in value of such property because of such nuisance. *City of Huntington v. Stemen*, 553, 556 (4).

OFFICERS—

- See AUDITING BOARD; COUNTY AUDITOR; COUNTY SURVEYOR; MUNICIPAL CORPORATIONS; TOWNSHIP TRUSTEE.
- Unlawful fees, paid to, collectible with interest, see INTEREST; *Zuelly v. Casper*, 186, 190 (2).
- Township trustees may enjoin religious organizations from using schoolhouses, see INJUNCTIONS, 5; *Baggerly v. Lee*, 139, 144 (3).
- Persons dealing with township trustee must take notice of powers of, see TOWNSHIPS, 1-3; *Indiana Trust Co. v. Jefferson Tp.*, 424.
1. *Deputy Marshal.*—*Right to Deny Capacity.*—Defendant, who has been acting deputy marshal for several months, is estopped, in an action on his official bond for damages, from denying that he was an officer *de jure*.
State, ex rel., v. Frentress, 245, 247 (3).

OFFICERS—Continued.

2. *Appointment.—Collateral Attack.*—Where defendant has been serving as deputy marshal for several months, his appointment is not subject to a collateral attack.
State, ex rel., v. Frentress, 245, 247 (4).
3. *Bonds.—Approval.—Liability.*—Where defendant deputy marshal executed his bond with surety to the town, the fact that the town trustees failed to approve such bond does not release the surety.
State, ex rel., v. Frentress, 245, 247 (5).
4. *Appointment.—Failure to Designate Term.*—The failure of the town trustees to designate the term for which a deputy marshal was appointed does not release him or his surety on his official bond where it is shown that he was acting under such appointment.
State, ex rel., v. Frentress, 245, 247 (6).
5. *Fees and Salaries.—Illegal Allowances.—Right to Retain.*—The allowances by the boards of commissioners of unlawful fees to public officers is no justification for the retention of same.
Zuelly v. Casper, 186, 191 (3).

OIL AND GAS—

See ESTATES; LANDLORD AND TENANT; REAL PROPERTY.

OPINIONS—

See EVIDENCE.

ORDINANCES—

See MUNICIPAL CORPORATIONS.

OVERRULED CASES—**DISTINGUISHED:**

- Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607, see *Fletcher v. Kelly*, 254, 260 (2).
- Grand Rapids, etc., R. Co. v. Pettit*, 27 Ind. App. 120, see *Clear Creek Stone Co. v. Carmichael*, 413, 417 (3).
- Hartman v. International Bldg., etc., Assn.*, 28 Ind. App. 65, see *Wayne, etc., Loan Assn. v. Gilmore*, 146.
- Herbert v. Rupertus*, 31 Ind. App. 553, see *Weaver v. Gray*, 35, 39 (1).
- Laporte Carriage Co. v. Sullender*, 165 Ind. 290, see *Muncie Pulp Co. v. Hacker*, 194, 204 (2).
- McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, see *Huntington Light, etc., Co. v. Beaver*, 4, 13 (6), and *Cleveland, etc., R. Co. v. Patterson*, 617, 623 (7).
- Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, see *Muncie Pulp Co. v. Hacker*, 194, 204 (2).
- New York, etc., R. Co. v. Perriguet*, 138 Ind. 414, see *Cleveland, etc., R. Co. v. Patterson*, 617, 623 (7).
- Tipton Light, etc., Co. v. Newcomer*, 156 Ind. 348, see *Cleveland, etc., R. Co. v. Snow*, 646, 649 (1).

EXPLAINED:

- Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346 and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124, see *Hancock v. Diamond Plate Glass Co.*, 351, 359 (2).

OVERRULED CASES—Continued.

FOLLOWED:

Indiana, etc., R. Co. v. Bundy, 152 Ind. 590, see *Fletcher v. Kelly*, 254, 262 (4).

Ohio, etc., R. Co. v. Heaton, 137 Ind. 1, see *Cleveland, etc., R. Co. v. Snow*, 646, 649 (1).

LIMITED:

Swift v. Hadley, 20 Ind. App. 614, see *Douglas v. Indianapolis, etc., Traction Co.*, 332, 336 (3).

QUESTIONED:

Indianapolis St. R. Co. v. Taylor, 158 Ind. 274, *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569 and *Pittsburgh, etc., R. Co. v. Lighthouse*, 163 Ind. 247, see *New Castle Bridge Co. v. Doty*, 84, 87 (4).

PARTIES—

On appeal, see **APPEAL AND ERROR**, 47-51.

Sufficiency of names of, in assignment of errors, see **APPEAL AND ERROR**, 2; *Williams v. Dougherty*, 449, 450 (1).

Death of, representatives must be substituted, see **APPEAL AND ERROR**, 49; *Ehlers v. Hartman*, 617.

The erroneous overruling of a demurrer for misjoinder of, not reversible, see **ACTION**, 2; *City of Huntington v. Stemen*, 553, 554 (2).

Interested parties are proper relators in action on drainage contractor's bond, see **ACTION**, 1; *State, ex rel., v. Karr*, 120, 124 (3).

Making new parties by amendment, see **PLEADING**, 3, 4; *Tyler v. Davis*, 557, 567 (6), 568 (7).

Wife of person losing money at gambling, not a necessary relatrix in action by State to recover, see **GAMING**, 1; *Tyler v. Davis*, 557, 566 (3).

Wife may enforce judgment in favor of State for money lost by husband at gambling, see **GAMING**, 3; *Tyler v. Davis*, 557, 567 (5).

Taxpayers, not parties to the record, cannot appeal in name of board of commissioners, see **APPEAL AND ERROR**, 51; *Board, etc., v. Wild*, 32.

PARTITION—

Allegation of ownership shows possession or right thereto, see **PLEADING**, 58; *Shetterly v. Axt*, 687, 689 (3).

Will is not foundation of suit for, see **PLEADING**, 70; *Shetterly v. Axt*, 687, 688 (1).

Executors and Administrators.—Husband and Wife.—Descent and Distribution.—Where the deceased childless wife received lands, as a gift from her father, one-third thereof descends to the husband and two-thirds to such father, subject to the payment of her debts; and such husband, father or her executor or administrator may maintain a suit for partition thereof (§1200 Burns 1901, Acts 1897, p. 125).

Weaver v. Gray, 35, 41 (2).

PASSENGERS—

See **CARRIERS**.

PATENTS—

Use of patented pavements in towns and cities, see **MUNICIPAL CORPORATIONS**, 6-16; *Monaghan v. City of Indianapolis*, 280.

1. *Right to Make, Sell and Use.—Presumption.*—The presumption, in the absence of a showing to the contrary, is, that the patentee has the exclusive right to make, sell and use the patented article during the term of the patent.

Monaghan v. City of Indianapolis, 280, 284 (1).

2. *Right to Sell.—Terms.—Presumption.*—It will not be presumed that a patentee will sell the right to use the patented article to all people on equal terms or on any terms.

Monaghan v. City of Indianapolis, 280, 292 (11).

PAYMENT—

See **BILLS AND NOTES**.

Receipt of, consequences of, in condemnation, see **EMINENT DOMAIN**.

PHOTOGRAPHS—

See **EVIDENCE**.

PHYSICIANS—

As to evidence by, see **EVIDENCE**, 18, 19; *Indianapolis, etc., Transit Co. v. Reeder*, 262, 264 (3), (4).

PLEADING—

See **JUDGMENT**.

Failure to set out the questioned pleading in the brief on appeal waives any alleged error therein, see **APPEAL AND ERROR**, 17-21.

Held good upon prior appeal, is *res judicata* on subsequent, see **APPEAL AND ERROR**, 40; *Zuelly v. Casper*, 186, 193 (8).

Answer cannot be attacked for first time on appeal, see **APPEAL AND ERROR**, 1; *Unger v. Mellinger*, 639, 641 (1).

Decision on special findings suffices for decision on pleadings where facts are same, see **APPEAL AND ERROR**, 52; *Indiana Rolling Mill Co. v. Gas Supply, etc., Co.*, 154, 155 (1).

Complaint good as against initial attack on appeal, if it states facts sufficient to bar another action for same cause, see **APPEAL AND ERROR**, 53; *Embree v. Emerson*, 16, 21 (4).

Sustaining demurrer to good paragraph of complaint harmless, where facts are provable under another, see **APPEAL AND ERROR**, 54; *Baggerly v. Lee*, 139, 146 (4).

Overruling demurrer to paragraph of answer is not available error where its facts are proved under another and where such facts are conclusive against plaintiff's recovery, see **APPEAL AND ERROR**, 55; *Pollard v. Pittman*, 475, 479 (1).

Sustaining demurrer to paragraph of answer harmless, where facts established under another paragraph preclude plaintiff's recovery, see **APPEAL AND ERROR**, 58; *Pollard v. Pittman*, 475, 479 (2).

Error in ruling on sufficiency of answer is harmless where plaintiff obtained judgment for full amount, see **APPEAL AND ERROR**, 59; *Equitable Trust Co. v. Torphy*, 220, 222 (1).

PLEADING—Continued.

Where complaint omits material fact, but special findings supply same, and no demurrer was filed to the complaint, an exception to the conclusions of law on such findings should be deemed a waiver of the right to make initial attack on such complaint on appeal, see **APPEAL AND ERROR**, 64; *Coulter v. Bradley*, 697, 698 (1).

Administrator cannot set off a judgment for the wife's funeral expenses, in his favor, against the surviving husband where such husband claimed his share in the property as a householder's exemption, see **EXECUTORS AND ADMINISTRATORS**; *Weaver v. Gray*, 35, 42 (3).

A paragraph of complaint for quieting title, and another for damages for a nuisance cannot properly be joined, see **ACTION**, 2; *City of Huntington v. Stemen*, 553, 554 (2).

Non est factum is available against an innocent holder of a note, see **BILLS AND NOTES**, 11; *Godman v. Henby*, 1, 3 (3).

1. *Complaint. — Alienation. — Malice.* — In an action by a wife against her mother-in-law for the alienation of the affections of such wife's husband, her complaint must show malice on the part of such mother-in-law, the presumption being that her acts were for the best interests of her child.

Gregg v. Gregg, 210, 217 (3).

2. *Complaint. — Alienation. — Initial Attack After Verdict.* — Where the initial attack on a complaint for alienation is made after verdict, such complaint alleging that the wife was compelled to leave the husband on account of cruel and inhuman treatment, but not setting out specific acts thereof, the presumption obtains that proof of such acts was given on the trial.

Gregg v. Gregg, 210, 219 (8).

3. *Making New Parties. — Amendments.* — Under §273 Burns 1901, §272 R. S. 1881, the court has power to permit others, who may be interested, to be made parties to an action by proper amendment.

Tyler v. Davis, 557, 567 (6).

4. *Substitution of Plaintiffs. — Amendments. — Gaming.* — It is proper for the trial court to permit the wife, who is the beneficiary of a judgment recovered by the State in an action to recover her husband's money lost at gambling, to be substituted as plaintiff instead of the State in a suit for the enforcement of such judgment, such amendment making no change in the issues.

Tyler v. Davis, 557, 568 (7).

5. *Complaint. — Amendments.* — Where an amendment, asked after the overruling of a motion for a new trial, does not materially change the issues, it should be allowed.

Gregg v. Gregg, 210, 218 (6).

6. *Complaint. — Amendments. — Abuse of Discretion.* — Where plaintiffs asked leave to amend their complaint, after the evidence had been received, to show that the court should take into consideration a sum alleged to have been paid as a compromise, the overruling of such request was erroneous as an abuse of legal discretion.

Zuelly v. Casper, 186, 193 (7).

7. *Answer. — Additional Answer. — Paragraphs. — Demurrers.* — Where defendant answered by a single paragraph in confession and avoidance and later filed an additional answer, also in avoidance, a demurrer to the "second paragraph of answer" presents no question, such answers presenting but a single defense and thus but one paragraph.

Unger v. Mellinger, 639, 642 (3).

PLEADING—Continued.

8. *Answer.—Denial of Part of Complaint.—Avoidance of Part.*—Under the Indiana code (§350 Burns 1901, §347 R. S. 1881) an answer denying part of the allegations of the complaint and avoiding others constitutes but a single ground of defense.
Unger v. Mellinger, 639, 641 (2).
9. *Complaint.—Sufficient as to Part of Claim.*—A complaint sufficient as to any portion of the demand will withstand a demurrer for want of facts.
Gilman v. Fultz, 609, 611 (1).
10. *Sustaining Motion to Strike Out Material Parts.—Harmless Error.—Mechanics' Liens.*—Sustaining a motion to strike out all averments of a complaint asking for the enforcement of a mechanic's lien and the notice of intention to hold a lien is harmless error where on the trial it is found that defendants owed nothing to plaintiff on account of the claim sued on.
Greer-Wilkinson Lumber Co. v. Steen, 595.
11. *Facts.—Conclusions.*—A pleading setting out the facts is not rendered bad by surplusage consisting of the legal conclusions from such facts.
Hamilton Nat. Bank v. Nye, 464, 466 (2).
12. *Answer.—Failure to Demur.—Testing Same by Questioning Sufficiency of Evidence.*—Where plaintiffs fail to demur to defendants' answers, they may question the sufficiency of such defenses by objecting to the sufficiency of the evidence.
Zuelly v. Casper, 186, 188 (1).
13. *Demurrer to Complaint.—Form.*—A demurrer for the reason that the complaint "does not contain facts sufficient to constitute a good cause of action" is sufficient, being equivalent to the language of the statute.
Hay v. Bash, 167, 169 (2).
14. *Demurrer for Want of Facts.—Raises Question of Plaintiff's Authority to Maintain Suit.*—A demurrer for want of sufficient facts raises the question of plaintiff's authority to maintain an action for the cause stated.
State, ex rel., v. Karr, 120, 122 (1).
15. *Complaint.—Exhibits.—References to, in Answer.—Sufficiency.*—Where the complaint sets out the contract sued on as an exhibit, it is not necessary to set out same in the answer or cross-complaint, an inclusion thereof by reference being sufficient.
Nichols & Shepard Co. v. Berning, 109, 113 (2).
16. *Complaint.—Answer.—Demurrer.—Carrying Back to Complaint.*—Where plaintiff's demurrer to an answer is overruled, defendant cannot complain that it was not carried back and sustained to the complaint.
Embree v. Emerson, 16, 21 (5).
17. *Answer.—Sustaining Demurrer to Paragraph Whose Facts Are Provable under Another.*—Sustaining a demurrer to a paragraph of answer whose facts are provable under another paragraph is harmless error.
Shetterly v. Axt, 687, 688 (2).
18. *Answer.—Verification.—Bills and Notes.—Indorsements.—Unauthorized.*—An answer, in an action by the indorsee of a bank check, that the plaintiff derived title through an unauthorized indorsement by one claiming to be the agent of the payee, is sufficient and needs no verification.
Hamilton Nat. Bank v. Nye, 464, 465 (1).
19. *Complaint.—Bills and Notes.—Lost.—Averments.*—A complaint upon a negotiable note, lost before maturity, must allege that such note was not indorsed.
Embree v. Emerson, 16, 20 (1).

PLEADING—Continued.

20. *Complaint.—Bills and Notes.—Lost.—Ownership.*—In an action by the payee of a lost negotiable note it is unnecessary to allege ownership, such fact being presumed.
Embree v. Emerson, 16, 20 (2).
21. *Cross-Complaint.—When Treated as Original.—Appeal and Error.*—Where the parties at the trial treat a cross-complaint as the original complaint, it will be so considered on appeal.
City of Huntington v. Stemen, 553, 554 (1).
22. *Cross-Complaint.—Negating.—Acceptance of Order.*—Where plaintiff's complaint on a contract does not allege that an acceptance of defendant's order for goods was sent to and received by defendant, it is not necessary for defendant in his cross-complaint for reformation to negative the receipt of such acceptance of his order.
Nichols & Shepard Co. v. Berning, 109, 116 (5).
23. *Complaint.—Contracts.—Breach.—Motion to Make Specific.*—A motion to make more specific, in an action for breach of contract and for specific performance, should be overruled to a complaint alleging that defendant paid all the debts which he owed by the profits of his farm which plaintiff had cultivated for three years in consideration that defendant, upon the payment of all of his debts, would deed to plaintiff twenty acres of land, there being no claim that plaintiff paid such debts.
Grau v. Grau, 635, 637 (1).
24. *Complaint.—Contracts.—Breach.—Damages.—Due and Unpaid.*—It is not necessary that a complaint for damages for a breach of contract should in terms allege that the claim is due and unpaid, where it appears from the entire complaint that it is due and unpaid.
Grau v. Grau, 635, 638 (3).
25. *Complaint.—Contracts.—Breach.—Nominal Damages.*—A complaint which shows a breach of contract by defendant entitles plaintiff at least to nominal damages and is therefore sufficient as against a demurrer.
Grau v. Grau, 635, 638 (4).
26. *Complaint.—Drains.—Contracts.—Bonds.—Suits on, by Auditor as Relator.—Trusts.—Statutes.*—Where a contractor for a public drain refuses to perform his contract for the construction thereof, and the county auditor relets the contract for such construction to another contractor, paying a greater sum therefor, the county auditor is not a proper relator to bring an action on the bond of such original contractor for such damages, since he has no personal interest therein and is not the trustee of an express trust under §252 Burns 1901, §252 R. S. 1881.
State, ex rel., v. Karr, 120, 122 (2).
27. *Complaint.—Deceit.*—A complaint for deceit which shows that the deceit, if any, was not practiced upon plaintiff is bad.
Whitesell v. Study, 429, 435 (6).
28. *Complaint.—Injunctions.—Gas-and-Oil Lease.—Exhibits.*—Where the owners of the fee bring a suit for injunction against the life tenant and her lessee to prevent their taking and removing oil and gas from the land, the lease so executed is not a proper exhibit to the complaint, and the absence of such does not affect the sufficiency of the complaint.
Richmond Nat. Gas Co. v. Davenport, 25, 28 (1).
29. *Complaint.—Insurance.—Mutual Benefit.—Performance of Conditions.*—To authorize a recovery by the beneficiary of a certificate of a mutual benefit insurance association, it must be

PLEADING—Continued.

shown by the complaint that the assured performed the requirements of the constitution and by-laws, and an averment that the beneficiary performed all the conditions required by such beneficiary is insufficient.

Grand Lodge, etc., v. Hall, 371, 372 (2).

30. *Complaint.—Insurance.—Oral Contracts.*—A complaint upon an oral contract of insurance, showing the plaintiff's application, description of property, title, amount, period, agreement for policy in usual form, loss, demand for policy and performance of conditions by plaintiff, is sufficient.

Posey County Fire Assn. v. Hogan, 573, 577 (3).

31. *Complaint.—Insurance.—Oral Contracts.—Exhibits.*—In a complaint upon an oral contract of insurance an exhibit of the usual form of policy, alleged to have been contracted for, is unnecessary and adds nothing to the complaint.

Posey County Fire Assn. v. Hogan, 573, 578 (4).

32. *Complaint.—Damages to Property.—Negating Contributory Negligence.—Statutes.*—In an action for damages to personal property it is necessary to negative contributory negligence, as the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) did not change such rule.

Cincinnati, etc., St. R. Co. v. Klump, 660, 662 (1).

33. *Complaint.—Damages to Property.—Negating Contributory Negligence.—Common Law.*—At the common law it was not necessary to negative contributory negligence in actions for damage to personal property.

Cincinnati, etc., St. R. Co. v. Klump, 660, 662 (2).

34. *Complaint.—Damages to Personal Property.—Negating Contributory Negligence.*—A complaint alleging that defendant street railway company negligently run its car against the rear of plaintiff's wagon, thereby injuring such wagon, its contents and three mules hitched thereto, while such wagon was being driven by a competent and experienced driver who was exercising due care and prudence, sufficiently negatives contributory negligence.

Cincinnati, etc., St. R. Co. v. Klump, 660, 663 (4).

35. *Complaint.—Interurban Railroads.—Negligence.*—A complaint, by plaintiff, who was riding in a wagon, alleging that defendant interurban railroad company run its car at a high and dangerous rate of speed around a street corner, thereby injuring plaintiff who was exercising due care, is sufficient.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 543 (3).

36. *Complaint.—Allegations.—Inferences.—Negligence.—Master and Servant.*—A complaint by the servant alleging that the master "carelessly and negligently run and operated said mill and machinery, well knowing that the same was unsafe and dangerous in this, to wit, * * * that the fly or balance wheel was an old, condemned, cracked and blemished wheel;" that plaintiff was ignorant thereof and that the master knew thereof, is insufficient, there being no direct allegation of such defect, and such complaint is not cured by an allegation that plaintiff was injured by the negligence of defendant in failing to provide "a safe, secure and sound fly or balance wheel."

Hay v. Bash, 167, 170 (4).

37. *Complaint.—Theory.—Negligence.—Master and Servant.*—A complaint by a servant for damages on account of injuries

PLEADING—Continued.

received from the breaking of a fly-wheel in defendants' saw-mill is based upon the theory of negligence by the master in the use of dangerous machinery. *Hay v. Bash*, 167, 170 (3).

38. *Complaint.—Negligence.—Gas Explosions.*—A complaint showing that defendant gas company in turning on plaintiff's gas discovered a leak between the house valve and the street valve; that defendant in turning off such gas preparatory to repairs turned off the house valve instead of the street valve; that the plumber, thinking that such company had turned off the gas at the street valve, began his work of repairs, and in some manner unknown to the plaintiff occupant, the gas exploded, causing injuries to plaintiff, shows that such defendant was guilty of negligence.

Huntington Light, etc., Co. v. Beaver, 4, 9 (1).

39. *Answer.—Landlord and Tenant.—Leases.—Gas and Oil.*—To a complaint for the enforcement of the provisions of a gas-and-oil lease, an answer that defendant complied with such lease as to the drilling of two wells; that he canceled said contract as to the third well by releasing six and two-thirds acres of the twenty-acre tract; that the lease provided that lessee shall have the right to "cancel and annul its contract or any part thereof at any time;" that it was understood by the parties that such lease could be canceled and annulled as to such part of the tract for each well not drilled, is bad, there being nothing in the lease to indicate a lease of a part only of the tract nor anything in the answer to show that the wells were put down with such end in view, or how a division could be made.

Ramage v. Wilson, 532, 536 (2).

40. *Complaint.—Malicious Prosecution.*—A complaint for malicious prosecution must allege that the prosecution was malicious, without probable cause, and resulted favorably to defendant therein, the present plaintiff.

Whitesell v. Study, 429, 432 (1).

41. *Complaint.—Malicious Prosecution.—Criminal.—Civil.*—A complaint for malicious prosecution, criminal or civil, which shows that the action against plaintiff terminated in a judgment against plaintiff is bad.

Whitesell v. Study, 429, 433 (3).

42. *Master and Servant.—Assumption of Risk.—When Special Allegations Control General.*—The special allegations in an action by the servant for injuries caused by the master's negligence will not control general allegations of non-assumption of risk unless the assumption can be held as a matter of law from the special allegations.

Columbian, etc., Stamping Co. v. Burke, 518, 522 (4).

43. *Complaint.—Notice.—Constructive.—Defects.—Master and Servant.*—A complaint by the servant against the master alleging that the master had notice of the defects and the servant had not is sufficient, and such allegation includes actual and constructive notice.

Columbian, etc., Stamping Co. v. Burke, 518, 521 (2).

44. *Complaint.—Master and Servant.—Factory Act.*—A complaint showing that defendant operated an emery-wheel without any exhaust-fans or other means of protection, and that plaintiff, while working thereon under defendant's orders, was

PLEADING—Continued.

- injured thereby, while in the exercise of due care, states a cause of action under the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9). *Muncie Pulp Co. v. Hacker*, 194, 203 (1).
45. *Complaint.—Factory Act.—Practicability of Guarding Machinery.*—A complaint declaring upon a breach of the provisions of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) which alleges that the emery-wheel, in the use of which the injury occurred, was not provided with an exhaust-fan, that it was dangerous and that it was practical to operate it with exhaust-fans, is sufficient regardless of whether the impracticability of guards is a matter of defense as indicated in *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, or whether practicability is a matter to be affirmed by plaintiff in his complaint as indicated in *Laporte Carriage Co. v. Sullender*, 165 Ind. 290. *Muncie Pulp Co. v. Hacker*, 194, 204 (2).
46. *Complaint.—Factory Act.—Knowledge.—Effect.*—A complaint for damages for injuries caused by defendant's violation of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) does not need to negative plaintiff's knowledge of the defect. *Muncie Pulp Co. v. Hacker*, 194, 204 (3).
47. *Complaint.—Master and Servant.—Employers' Liability Act.*—A complaint showing that plaintiff was ordered to do certain work by defendant's foreman, to whose order plaintiff was bound to and did conform, in reference to turning a channeling machine, and that in doing such work such foreman, without waiting for plaintiff's signal to start, negligently gave an order to other workmen to turn such machine, thus catching plaintiff and crushing him before he could escape from his dangerous position, states a cause of action under §7083 Burns 1901, Acts 1893, p. 294. *Clear Creek Stone Co. v. Carmichael*, 413, 415 (1).
48. *Complaint.—Master and Servant.—Negligence.—Knowledge.*—In an action by a servant for negligence it is not necessary to allege actual knowledge on the part of defendant's foreman who negligently gave an order, by reason of which plaintiff was injured, proof of actual or constructive knowledge being sufficient to establish negligence. *Clear Creek Stone Co. v. Carmichael*, 413, 417 (2), 419 (2).
49. *Complaint.—Master and Servant.—Railroads.—Negligence.*—A complaint alleging that the train upon which plaintiff was riding "was in charge of the engineer and conductor, employes of defendant," and that the train with which it collided was "in charge of an engineer and conductor, employes of defendant," sufficiently shows that the engineers and conductors were in charge of the trains. *Southern Ind. R. Co. v. Baker*, 405, 408 (1).
50. *Complaint.—Mortgages.—Execution.*—A complaint alleging that defendant "executed" the mortgage sued on is sufficient, since execution includes delivery. *Embree v. Emerson*, 16, 21 (3).
51. *Complaint.—Exhibits.—Declaring Deed a Mortgage.—Cancellation of Instruments.—Suretyship and Guaranty.—Husband and Wife.*—A paragraph of complaint alleging that a certain deed was in reality a mortgage, and praying that it be declared such, and that it be canceled because the plaintiff, a married

PLEADING—Continued.

woman, executed same as surety, is sufficient; and it is not necessary to file such deed as an exhibit to such complaint.

Warner v. Jennings, 394, 397 (1).

52. *Complaint. — Municipal Corporations. — Streets. — Obstructions.*—A complaint against a town for personal injuries which alleges that an obstruction on one of the town streets frightened plaintiff's horse, thereby causing injuries, will be construed as showing that some third party placed such obstruction on such street.

Town of Royal Center v. Bingaman, 626, 628 (1).

53. *Complaint. — Municipal Corporations. — Streets. — Obstructions. — Necessity for.*—A complaint against a town for personal injuries caused by an obstruction of a street does not need to allege that there was no necessity for such obstruction.

Town of Royal Center v. Bingaman, 626, 629 (2).

54. *Complaint. — Municipal Corporations. — Streets. — Obstructions. — Notice.*—A complaint against a town for personal injuries caused by the obstruction of a street by a third party must show that the town had notice thereof.

Town of Royal Center v. Bingaman, 626, 629 (3).

55. *Complaint. — Municipal Corporations. — Streets. — Obstructions. — Negligence. — How Averred.*—A complaint against a town for personal injuries, which merely shows an obstruction of the street, notice thereof to the town and injuries caused thereby, is insufficient where it fails to show that the obstruction was negligently permitted to be or remain there.

Town of Royal Center v. Bingaman, 626, 629 (4).

56. *Complaint. — Municipal Corporations. — Streets. — Obstructions. — Frightening Horses. — Contributory Negligence.*—A complaint against a town for personal injuries caused by the frightening of plaintiff's horse at an obstruction in the street must show that such obstruction was such as to frighten an ordinarily gentle horse, and such averment is not for the purpose of negating contributory negligence.

Town of Royal Center v. Bingaman, 626, 630 (5).

57. *Complaint. — Municipal Corporations. — Streets. — Obstructions.*—A complaint against a town for personal injuries caused by an obstruction of its street is not necessarily insufficient because it does not in terms show that such obstruction was within the corporate limits, especially where it is evident from the whole complaint that it was within such limits.

Town of Royal Center v. Bingaman, 626, 635 (6).

58. *Complaint. — Partition. — Possession.*—A cross-complaint showing that the cross-complainant and defendants are the owners as tenants in common of certain lands and praying partition thereof is sufficient without any direct allegations of possession of such real estate by cross-complainant, the allegation of ownership being in effect an allegation of possession or right thereto.

Shetterly v. Art, 687, 689 (3).

59. *Complaint. — Contributory Negligence. — Railroads.*—A complaint alleging that plaintiff's decedent was unaware of the approach of defendant's train and without any fault on his part said train caused the injuries complained of sufficiently negatives contributory negligence.

Southern Ind. R. Co. v. Corps, 586, 590 (1).

PLEADING—Continued.

60. *Complaint.—Railroads.—Highway Crossings.—Collisions.*—A complaint showing that defendant railroad company's train struck decedent's wagon, thereby causing mortal injuries to decedent, sufficiently shows that decedent was on defendant's track. *Southern Ind. R. Co. v. Corps*, 586, 591 (3).
61. *Complaint.—Knowledge of Dangers.—Railroads.—Highway Crossings.—Collisions.*—A complaint against a railroad company, alleging that defendant railroad company's automatic bell did not ring at the crossing; that defendant's extra came without noise on a down grade; that it gave no signal by bell or whistle, and that decedent knew nothing of such extra, sufficiently shows a want of knowledge by decedent of such danger. *Southern Ind. R. Co. v. Corps*, 586, 591 (4).
62. *Complaint.—Railroads.—Defective Engines.*—A complaint by the servant showing that defendant railroad company ordered him, over his protest, to run an engine the windows of which had been boarded up, thus compelling him, in order to receive signals and see his train, to hold his head near the water-gauge, which was defective and liable to burst, of which defect defendant had knowledge and plaintiff had not, states a cause of action. *Cleveland, etc., R. Co. v. Patterson*, 617, 621 (2).
63. *Complaint.—Railroads.—Tickets.—Wrongful Refusal to Honor.—Torts.—Contracts.*—An action by a passenger on account of the defendant railroad company's wrongful refusal to honor his ticket and his consequent expulsion from the station because he could not "satisfy" defendant's agent that he was the original purchaser thereof, sounds in tort, and not in contract. *Pittsburgh, etc., R. Co. v. Coll*, 232, 237 (3).
64. *Complaint.—Motion to Make More Specific.—Railroads.—Defective Switch Locks.*—It is not error to overrule a motion to make more specific a complaint alleging that defendant railroad company negligently left a switch open at a time when it should have been locked; that such switch and lock were insufficient and so out of repair that the switch could not be securely locked and fastened and that defendant negligently allowed such lock, switch and target to be and remain out of repair, weak, insufficient and defective. *Tipton Light, etc., Co. v. Newcomer*, 156 Ind. 348, distinguished; *Ohio, etc., R. Co. v. Heaton*, 137 Ind. 1, followed. *Cleveland, etc., R. Co. v. Snow*, 646, 649 (1).
65. *Complaint.—Railroads.—Open Switch.*—A complaint showing that defendant negligently left and permitted the lock, switch and appliances to become and remain open at a time when the switch should have been closed and locked, sufficiently shows negligence in the management of the switch. *Cleveland, etc., R. Co. v. Snow*, 646, 650 (2).
66. *Cross-Complaint.—Reformation.—Indefiniteness.—Motion to Make Specific.*—Where a cross-complaint for reformation does not definitely set out the mistake complained of, a motion to make specific, and not a demurrer for want of facts, is the proper remedy. *Nichols & Shepard Co. v. Berning*, 109, 116 (6).
67. *Complaint.—Demurrer.—Special Findings.*—Where a demurrer is erroneously sustained to a paragraph of complaint, the fact that the judgment logically follows the special findings on the other paragraphs thereof does not render such error harmless. *Warner v. Jennings*, 394, 397 (2).

PLEADING—Continued.

68. *Complaint.—Trusts.—Conversion of Funds.*—A complaint for the recovery of converted trust funds is good though it shows that by the terms of the contract creating the trust it shall continue until the death of the trustee, a cause of action arising immediately after the breach of such agreement by the trustee, and not after his death.
Case v. Collins, 491, 500 (3).
69. *Complaint.—Usury.—Recovery.*—A complaint for the recovery of usurious interest paid to defendant, which alleges that plaintiff borrowed \$30 for 30 days and that defendant collected plaintiff's wages and retained such sum together with \$10 additional as usurious interest, is sufficient.
Gilman v. Fultz, 609, 611 (2).
70. *Complaint.—Exhibits.—Wills.—Partition.—Quieting Title.*—In a cross-complaint for partition, the will, under which all parties claim title, is not the foundation of the action and therefore is not a proper exhibit, and cannot be considered.
Shetterly v. Azt, 687, 688 (1).

PREFERENCES—

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

PRESUMPTIONS—

- None that patentee will sell to all people on equal terms, see PATENTS, 2; *Monaghan v. City of Indianapolis*, 280, 292 (11).
- No presumption from precipe calling for that part of the record affecting one defendant, that other defendants were not before the court and affected by the judgment, see APPEAL AND ERROR, 56; *Helberg v. Dovenmushle*, 377, 380 (2).
- Suicide cannot be presumed, see INSURANCE, 7; *Equitable Life Ins. Co. v. Hebert*, 373, 374 (1).
- Disputable presumption that a deed in hands of grantee was delivered, see DEEDS, 5; *Corr v. Martin*, 655, 659 (4).
- None that note was payable in bank, see EVIDENCE, 20; *Embree v. Emerson*, 16, 25 (8).
- Of negligence from collision, does not arise in favor of servant, see MASTER AND SERVANT, 7; *Southern Ind. R. Co. v. Baker*, 405, 410 (3).

PRINCIPAL AND SURETY—

See BILLS AND NOTES, 7, 8; *Pollard v. Pittman*, 475, 480 (4), (5).

PRINCIPAL AND AGENT—

- Notice to an insurance agent authorized to write applications and collect money, is notice to the company, see INSURANCE, 12; *Metropolitan Life Ins. Co. v. Willis*, 48, 52 (3).
1. *Delegation of Authority.—Assistants.*—Where plaintiff's agent employed another person to assist in making a sale and the sale so made was accepted by such agent and afterwards ratified by the plaintiff, the question of delegation of authority to such assistant is superfluous.
Nichols & Shepard Co. v. Berning, 109, 118 (9).
2. *Corporations.—Superintendents.—Release.—Contracts.*—The general agent of a corporation, having power to employ and discharge men, has the power on behalf of such corporation to enter into a contract with an injured employe for the release of such employe's claim for damages.
American Quarries Co. v. Lay, 386, 391 (5).

PRINCIPAL AND AGENT—Continued.

3. *Salesman.—Authority to Indorse Checks.*—An ordinary traveling salesman has no implied authority to indorse checks payable to his principal.

Hamilton Nat. Bank v. Nye, 464, 467 (6).

PROCESS—

1. *Service by Leaving Copy.—Special Appearance.—Motion to Quash.*—A sheriff's return showing that summons was served upon defendant by leaving a certified copy thereof at defendant's last and legal place of residence, in the absence of fraud, is conclusive against a collateral attack.

Tyler v. Davis, 557, 566 (1).

2. *Malicious Abuse of.—Unlawful Purpose.*—Where legal process was successfully used in one case to have a widow's election set aside, and in another for the collection of a valid debt, no unlawful end being demanded or required in either case, an action against the plaintiff therein for malicious abuse of process will not lie.

Whitesell v. Study, 429, 433 (4).

3. *Malicious Intent.*—Where plaintiff uses legal process for the purpose of enforcing his legal or equitable rights, his malicious motive is immaterial.

Whitesell v. Study, 429, 434 (5).

PROMISSORY NOTES—

See **BILLS AND NOTES**.

PROXIMATE CAUSE—

See **DAMAGES**, 4; **NEGLIGENCE**.

PUBLIC POLICY—

Forbids marriage contract from fixing amount of alimony in event of divorce, see **CONTRACTS**, 14; *Watson v. Watson*, 548, 552 (4).

Provision in a building contract making architect's decision final, void, see **CONTRACTS**, 2; *Maitland v. Reed*, 469, 470 (1).

PUBLIC RECORDS—

Purchasers must take notice of contents, see **NOTICE**, 1; *American, etc., Glass Co. v. Indiana, etc., Oil Co.*, 439, 448 (8).

QUIETING TITLE—

Will, not basis of suit for, see **PLEADING**, 70; *Shetterly v. Art*, 687, 688 (1).

New Trial as of right, not demandable in cases of, where injunction was the primary object of suit, see **NEW TRIAL**, 7; *Indiana Rolling Mill Co. v. Gas Supply, etc., Co.*, 154, 160 (4).

1. *Ownership in Fee Simple.—Failure of Proof.*—Where plaintiff, in a suit to quiet title, alleged a fee-simple title and his proof showed that he held such title except a small undivided interest belonging to an heir of a deceased grantee, there is a failure of proof.

Cline v. Hays, 329, 331 (1).

2. *Adverse Possession.*—Where defendant has held possession of lands for twenty years claiming such lands to be his own, such possession is adverse and he is the owner of such lands.

Cline v. Hays, 329, 331 (2).

RAILROADS—

See CARRIERS; MASTER AND SERVANT; PLEADING; TRIAL.

Must excuse injury received by passenger, see TRIAL, 78; *Evansville, etc., R. Co. v. Mills*, 598, 604 (5).

Statutes relating to exercise of right of eminent domain, see STATUTES, 9, 10; *Indianapolis, etc., Traction Co. v. Ramer*, 264.

Ejection of passenger because of wrongful refusal to honor ticket, damages for, see DAMAGES, 1; *Pittsburgh, etc., R. Co. v. Coll*, 232, 238 (5).

1. *Tickets.—Contracts.—Validity.*—A provision in a railroad ticket that such ticket shall not be good for the return trip unless the holder satisfies the agent of the issuing company that he was the original purchaser, is valid and enforceable, but the passenger's right to transportation is not affected by an arbitrary refusal of such agent to be satisfied.

Pittsburgh, etc., R. Co. v. Coll, 232, 236 (1).

2. *Tickets.—Identification.—Contracts.*—Where the holder of a railroad ticket, providing that the holder shall satisfy the issuing company's agent that he was the original purchaser, by writing his name or by other means, fails to satisfy such agent by writing his name, he has the right to identify himself otherwise.

Pittsburgh, etc., R. Co. v. Coll, 232, 236 (2).

3. *Highway Crossings.—Duty to Make Safe.*—It is the imperative duty of a railroad company constructing or operating a railroad over a public highway to make the highway crossing safe.

Southern Ind. R. Co. v. Corps, 586, 592 (5).

4. *Highway Crossings.—Depressions.—Negligence.*—Railroad companies are liable for negligence in the depression of highway crossings proximately causing injuries.

Southern Ind. R. Co. v. Corps, 586, 592 (6).

5. *Passengers Riding in Freight-Car.—Contributory Negligence.—Assumption of Risk.*—A live-stock attendant riding, by contract, on the car containing such stock neither assumes the risks of defendant's negligence, nor is he guilty of contributory negligence.

Evansville, etc., R. Co. v. Mills, 598, 605 (6).

6. *Engineers.—Whether Duty to Receive Signals from Firemen Exclusive.*—It is the duty of a railroad engineer to keep a vigilant outlook, and he is not compelled to rely exclusively upon signals from his fireman in the operation of his engine.

Cleveland, etc., R. Co. v. Patterson, 617, 622 (5).

RATIFICATION—

Of contract for release of claim for damages, what is, see CONTRACTS, 8; *American Quarries Co. v. Lay*, 386, 392 (6).

REAL PROPERTY—

As to boundaries of, see BOUNDARIES, 1-3; *Wilson v. Powell*, 44.

Unmined gas and oil are, see ESTATES, 1; *Richmond Nat. Gas Co. v. Davenport*, 25, 30 (2).

Life tenants have right to use of oil-and-gas wells already in operation, but not the right to begin operations, see ESTATES, 2; *Richmond Nat. Gas. Co. v. Davenport*, 25, 31 (4).

RECEIVERS—

Conveyance of gas-and-oil lease with covenant for payment of rent by, renders grantee liable for rent, see LANDLORD AND TENANT, 9; *Robyn v. Pickard*, 161.

REFORMATION OF INSTRUMENTS—

Complaint must set out the mistake claimed, see **PLEADING**, 66;
Nichols & Shepard Co. v. Berning, 109, 116 (6).

Demand.—*Cross-Complaint.*—Where plaintiff has brought an action on an alleged contract with defendant, it is not necessary for defendant to make a demand for reformation before asking for same in a cross-complaint.

Nichols & Shepard Co. v. Berning, 109, 114 (3).

RELEASE—

See **BILLS AND NOTES**.

RES GESTAE—

See **EVIDENCE**.

RES JUDICATA—

See **JUDGMENT**.

ROADS—

See **HIGHWAYS**.

SALES—

Of patented pavements, see **PATENTS**, 1, 2; *Monaghan v. City of Indianapolis*, 280, 284 (1), 292 (11).

By receiver, of gas-and-oil lease carries liability to pay rent, see **LANDLORD AND TENANT**, 9; *Robyn v. Pickard*, 161.

Representation of as not constituting fraud on subsequent mortgagee, see **ESTOPPEL**; *Williams v. Ketcham*, 506.

Price fixed in contract of, governs amount of recovery usually, see **CONTRACTS**, 22; *Over v. Byram Foundry Co.*, 452, 455 (1).

1. *Conditional.—Notice of Rejection.*—Where plaintiff sold to defendant, on a sixty-day trial, a wind pumping outfit, and defendant within such sixty days notified plaintiff that it was unsatisfactory, no sale was perfected.

Allyn v. Burns, 223, 228 (3).

2. *Conditional.—Damages.—Responsibility for.*—Where plaintiff erected on June 16, a wind pumping outfit, the defendant to pay for same if satisfactory at the end of a sixty-day trial, and on August 15, defendant gave plaintiff notice that it was unsatisfactory, defendant is not liable, in the absence of wilful misconduct, for damages to such outfit occurring in December.

Allyn v. Burns, 223, 228 (4).

SCHOOLS—

Injunction lies to prevent religious organization from using schoolhouse, see **INJUNCTION**, 5; *Baggerly v. Lee*, 139, 144 (3).

1. *Township Trustee's Control over Property.—Statutes.*—Under §8068 Burns 1901, §5993 R. S. 1881, the township trustee has the control and supervision of the school property of his township.
Baggerly v. Lee, 139, 142 (1).

2. *Schoolhouses.—When Occupied "for Common School Purposes."*—A schoolhouse is occupied "for common school purposes" under §5999 Burns 1901, §4510 R. S. 1881, from the beginning of the school term to its end, including nights, Saturdays and Sundays.
Baggerly v. Lee, 139, 142 (2).

SERVICE—

See PROCESS.

Appellant cannot question, on appeal, the service of summons on his coparties, see APPEAL AND ERROR, 60; *Tyler v. Davis*, 557, 566 (2).

SET-OFF AND COUNTERCLAIM—

See PLEADING.

SETTLEMENT—

See COMPROMISE AND SETTLEMENT.

SIDEWALKS—

See MUNICIPAL CORPORATIONS.

SPECIAL FINDINGS—

See PLEADING; TRIAL, 57-60.

SPECIFIC PERFORMANCE—

Contracts.—Conveyances.—Consideration.—Care and Support.
Where decedent proposed that if plaintiff would take care of and provide for him during the remainder of his life he would convey to her his farm, and she accepted same, such agreement was founded upon a valuable consideration, and if she faithfully carried out such agreement, specific performance should be decreed. *Fifer v. Rachels*, 275, 277 (1).

STATUTES—

See MUNICIPAL CORPORATIONS.

For table of statutes cited and construed, see p. xxiv.

Street assessments construed strictly in favor of frontagers, see MUNICIPAL CORPORATIONS, 1; *Marion Trust Co. v. City of Indianapolis*, 672, 676 (2).

Settlement by county auditor with board of commissioners for less than amount due, not conclusive, see COMPROMISE AND SETTLEMENT, 1; *Zuelly v. Casper*, 186, 191 (4).

Civil procedure act of 1903 (Acts 1903, p. 338) does not apply to criminal procedure, see APPEAL AND ERROR, 23; *Guy v. State*, 691, 696 (7).

For listing personalty, time of, see TAXATION, 1; *Corr v. Martin*, 655, 658 (1).

1. *Construction.—Meaning.*—All parts of a statute should be construed together to ascertain its meaning.

Marion Trust Co. v. City of Indianapolis, 672, 676 (1).

2. *Construction.—Factory Act.*—In construing sections one and eighteen of the factory act (Acts 1899, p. 231, §§7087a, 7087r Burns 1901), the court will look at the general purpose of the statute and the grievances which it was designed to prevent.

Hoffmeyer v. State, 526, 531 (2).

3. *Criminal.—Strict Construction.*—While statutes for the punishment of crimes are strictly construed, still, they should be construed to carry out the evident purposes for which they were enacted.

Hoffmeyer v. State, 526, 532 (3).

4. *Construction.—Intention.—Criminal Law.*—Courts, in the construction of criminal statutes, will look to the evil that was intended to be remedied.

De Tarr v. State, 323, 327 (3).

STATUTES—Continued.

5. *Construction.—In Pari Materia.*—Statutes upon the same general subject when constituting part of a general system of legislation, though they were not enacted at the same session, will be construed *in pari materia*.
Indianapolis, etc., Traction Co. v. Ramer, 264, 271 (3).
6. *Construction.—Meaning of Words.*—In the construction of a statute words are to be given their ordinary meaning unless that would defeat the manifest intent.
Townsend v. Meneley, 127, 132 (5).
7. *Remedial.—Construction.—Descent and Distribution.—Illegitimate Children.*—Statutes providing that under certain circumstances illegitimate children shall be heirs of their fathers are remedial and should be liberally construed.
Townsend v. Meneley, 127, 134 (9).
8. *Retroactive.—Descent and Distribution.—Illegitimate Children.*—Under §2630a Burns 1901, Acts 1901, p. 288, an illegitimate child, acknowledged by the intestate ancestor to be his, such ancestor leaving no legitimate children or descendants thereof, inherits such ancestor's estate, although such ancestor's acknowledgment of such child occurred before the taking effect of such statute, and not afterwards.
Townsend v. Meneley, 127, 134 (10), 138 (10).
9. *In Pari Materia.—Railroads.—Eminent Domain.—Benefits.*—Article 41 of the civil code of 1852 (2 R. S. 1852, p. 188, §683 *et seq.*, §893 *et seq.* Burns 1901, §881 *et seq.* R. S. 1881) and 1 R. S. 1852, p. 409 (§5134 *et seq.* Burns 1901, §3885 *et seq.* R. S. 1881), both providing for the assessment of damages in cases of railroads exercising the right of eminent domain, being enacted at the same session, are construed *in pari materia*; and damages may be legally assessed by either method, but in neither case can benefits be offset against damages sustained by the landowner.
Indianapolis, etc., Traction Co. v. Ramer, 264, 266 (1).
10. *Interurban Railroads.—Eminent Domain.—Benefits.*—The act of 1901 (Acts 1901, p. 461, §5468a Burns 1901) and the amendatory act of 1903 (Acts 1903, p. 92), providing for the condemnation of land for rights of way for interurban railroads, and having substantially adopted the provisions of the statutes relating to the condemnation of lands by railroad companies, will be construed *in pari materia* with such statutes, and no benefits can be considered in estimating damages for the condemnation of rights of way for such interurban roads.
Indianapolis, etc., Traction Co. v. Ramer, 264, 272 (4).
11. *Factory Act.—Exhaust-Fans.—Dust.—Question for Jury.*—Where the statute (§7087i Burns 1901, Acts 1899, p. 231, §9) requires employers to provide emery-wheels with exhaust-fans to carry away the "dust," the court cannot, as a matter of law, say that "dust" does not include particles of emery or metal large enough to injure the eye, such question being for the jury.
Muncie Pulp Co. v. Hacker, 194, 205 (4).
12. *Construction.—Municipal Corporations.—Sidewalks.*—The statute (Acts 1897, p. 79, §1), providing that the board of public works of certain cities may "improve only a part, or one side of any street, or sidewalk, or other place," should be read as though the words "or sidewalk" were omitted, the second proviso of such section specifically covering sidewalks, and such second proviso being meaningless upon any other construction.
Marion Trust Co. v. City of Indianapolis, 672, 678 (4).

STREET RAILROADS—

See INTERURBAN RAILROADS; PLEADING.

In street, not an additional servitude upon frontagers' lots, see EASEMENTS; *Indianapolis, etc., Traction Co. v. Ramer*, 264, 270 (2).

STREETS—

See MUNICIPAL CORPORATIONS.

SUMMONS—

See PROCESS.

SUNDAY—

See CRIMINAL LAW.

SUPPORT—

Husband must support wife to the extent of his ability, see HUSBAND AND WIFE, 12; *Watson v. Watson*, 548, 551 (3).

SURVEYOR—

See COUNTY SURVEYOR.

TAXATION—

1. *Time of Listing Personal Property in 1903.—Real Estate.—Statutes.*—Under §§8418, 8419 Burns 1901, Acts 1891, p. 199, §§8, 9, personal property was listed for taxation in 1903 as owned on April 1, and one owning the legal title to real estate of said date became personally liable for the payment of the taxes thereon. *Corr v. Martin*, 655, 658 (1).

2. *Bills and Notes.—Mortgages.—Delivery.*—Notes and a mortgage securing same, delivered in part payment of the purchase price of a farm on April 8, 1903, are not assessable against the payee and mortgagee for taxes for the year 1903, although the contract for such land was made prior to April 1, 1903, and the deed held in escrow on such date.

Corr v. Martin, 655, 659 (5).

TELEGRAPHS AND TELEPHONES—

Measure of damages for negligent failure to send message, see DAMAGES, 5; *Kagy v. Western Union Tel. Co.*, 73, 79 (3).

Answerable for all damages of which such companies' negligence is proximate cause, see DAMAGES, 4; *Kagy v. Western Union Tel. Co.*, 73, 78 (2).

1. *Failure to Deliver Message.—Anticipation of Injuries.*—A telegraph company failing to send plaintiff's message to his father: "Come at once prepared to stay. We are both sick," without other warning or notice, cannot be presumed to have known that its failure to deliver same would, in the natural course of events, cause a rupture of plaintiff's intestine.

Kagy v. Western Union Tel. Co., 73, 79 (4).

2. *Failure to Deliver Message.—Anticipation of Injuries.*—Where defendant telegraph company failed to deliver plaintiff's message to his father, informing such father that he and his wife were sick, plaintiff cannot recover damages therefor because of plaintiff's being deprived of his father's nursing, when defendant was not apprised that such father was experienced as a nurse.

Kagy v. Western Union Tel. Co., 73, 80 (5).

TELEGRAPHS AND TELEPHONES—Continued.

3. *Failure to Deliver Message.—Mental Anguish.—Damages.*—A telegraph company is not liable for plaintiff's mental anguish resulting from its negligent failure to deliver a message.
Kagy v. Western Union Tel. Co., 73, 81 (6).
4. *Failure to Deliver Message.—Mental Anguish Followed by Physical Injury.—Damages.*—No damages are collectible for physical injuries sustained as a result of mental anguish caused by a telegraph company's negligent failure to deliver a message.
Kagy v. Western Union Tel. Co., 73, 81 (7).

TEXT-BOOKS—

For table of text-books cited, see p. xxix.

THREATS—

See CRIMINAL LAW.

TOWNS—

See MUNICIPAL CORPORATIONS.

TOWNSHIP TRUSTEE—

See OFFICERS; TOWNSHIPS.

Has control over school property, see SCHOOLS, 1; *Baggerly v. Lee*, 139, 142 (1).

TOWNSHIPS—

1. *Incurring Indebtedness.—Notice.—Officers.*—All persons dealing with a township trustee must take notice of the limits of his power to bind his township.
Indiana Trust Co. v. Jefferson Tp., 424, 427 (1).
2. *Auditing Board.—Powers.—Indebtedness.*—Under the act of 1897 (Acts 1897, p. 222) the auditing of an unauthorized township warrant by the auditing board did not give such warrant any validity, such act being intended to circumscribe and not to enlarge the powers of township trustees.
Indiana Trust Co. v. Jefferson Tp. 424, 429 (2).
3. *Borrowing Money When Unnecessary.—Recovery.*—A township warrant issued by a township trustee on his road fund, where such fund had enough money to pay its expenditures, although approved by the auditing board, is not enforceable.
Indiana Trust Co. v. Jefferson Tp., 424, 429 (3).

TRACTION COMPANIES—

See INTERURBAN RAILROADS.

TRANSFER—

From Appellate to Supreme Court, see APPEAL AND ERROR, 61, 62.

TRIAL—

- As to questioning instructions on appeal, see APPEAL AND ERROR, 28-32.
- As to excepting to the giving of instructions, see APPEAL AND ERROR, 28; *Fletcher v. Kelly*, 254, 262 (4).
- Failure to set out questioned instructions in brief on appeal, waives any errors therein, see APPEAL AND ERROR, 16; *McNulty v. State*, 612, 616 (3).
- De novo* in cases of appeals from awards in condemnation, see EMINENT DOMAIN, 2, 5; *Indianapolis, etc., Traction Co. v. Dunn*, 248, 250 (3); *Douglas v. Indianapolis, etc., Traction Co.*, 332, 337 (4).

TRIAL—Continued.

Burden of proving that assured died from suicide, upon defendant, see **INSURANCE**, 7; *Equitable Life Ins. Co. v. Hebert*, 373, 374 (1).

Burden of proof to establish illegitimacy and acknowledgment by the father is upon plaintiff, see **DESCENT AND DISTRIBUTION**, 9; *Townsend v. Meneley*, 127, 132 (6).

Where the evidence shows that plaintiff cannot recover, judgment on answers to the interrogatories to the jury will be ordered, see **APPEAL AND ERROR**, 45; *Chicago, etc., R. Co. v. Bryan*, 487, 491 (3).

Burden on defendant to prove that alienated husband had no affection for his wife, see **HUSBAND AND WIFE**, 3; *Gregg v. Gregg*, 210, 218 (7).

Burden of proof on landowner to show damages in condemnation, see **EMINENT DOMAIN**, 5, 8; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 337 (4); *Indianapolis, etc., Traction Co. v. Ramer*, 264, 273 (6).

1. *Argument of Counsel.—Misconduct.*—Where the court, upon defendant's motion, struck out objectionable remarks of counsel for plaintiff in the argument to the jury, and instructed the jury not to consider same, reversible error is not committed, no prejudice being shown against defendant.

Southern Ind. R. Co. v. Baker, 405, 411 (6).

2. *Criminal Law.—Argument of Counsel.*—A statement by the prosecuting attorney in his argument to the jury that defendant's motion to quash the indictment had been overruled, while not legitimate argument, was justifiable in view of the fact that the counsel for defendant had stated in argument that if the State had proved the allegations of the indictment it was not entitled to a verdict because the indictment did not state an offense against the law, since for the purpose of the trial that question was foreclosed by the trial court's ruling on the motion to quash.

White v. State, 95, 103 (7).

3. *Criminal Law.—Argument of Counsel.*—A statement by the prosecuting attorney in his argument to the jury that "Lew Trees [a merchant for whom defendant was clerking] was related to Eph. Marsh and Jonas Walker," they being of counsel for defendant, is not reversible error though the evidence thereof was lacking, no injury being shown.

White v. State, 95, 104 (8).

4. *Bills and Notes.—Burden of Proof.—Non est Factum.*—Where defendant pleads *non est factum* to an action on a promissory note, the burden of proof as to the execution of such note remains at all times upon the plaintiff.

Godman v. Henby, 1, 2 (1).

5. *Burden of Proof.*—The party who would lose if no evidence were given on a proposition has the burden of proof on such proposition.

New Castle Bridge Co. v. Doty, 84, 86 (2).

6. *Affirmative Defenses.—Burden of Proof.*—The law casts upon a defendant who asserts an affirmative defense the burden of proving such defense.

New Castle Bridge Co. v. Doty, 84, 86 (3).

7. *Burden of Proof.—Contributory Negligence.*—Contributory negligence is a defense in cases of personal injuries.

Southern Ind. R. Co. v. Corps, 586, 591 (2).

TRIAL—Continued.

8. *Evidence.—Inferences.*—It is not essential for plaintiff to prove every allegation of his complaint by direct and positive evidence, since the jury has the right to draw reasonable inferences from the facts proved.
Evansville, etc., R. Co. v. Mills, 598, 603 (4).
9. *Evidence.—Custom.—Railroads.*—Admitting the testimony of two witnesses, over objection, that they rode in stock-cars as attendants of live stock on defendant's road, if erroneous, was harmless.
Evansville, etc., R. Co. v. Mills, 598, 606 (7).
10. *Instructions.—Covered by Those Given.*—Where instructions requested are substantially covered by those given, no error is committed in refusing those requested.
Allyn v. Burns, 223, 231 (6).
Evansville, etc., R. Co. v. Mills, 598, 609 (9).
Clear Creek Stone Co. v. Carmichael, 413, 419 (5).
Huntington Light, etc., Co. v. Beaver, 4, 16 (11).
11. *Instructions.—Bills and Notes.—Non est Factum.—Burden of Proof.*—An instruction, in an action upon a note where the defense was *non est factum*, that the plaintiff must prove by a preponderance of the evidence all of the material allegations of his complaint and defendants must likewise prove the allegations of their answer is erroneous, the burden of proof on the question of the execution of such note being upon the plaintiff.
McCormick v. Higgins, 107.
12. *Instructions.—Burden of Proof.—Contributory Negligence.*—An instruction that the burden of proving contributory negligence in a personal injury case is on the defendant is correct.
Indianapolis St. R. Co. v. Taylor, 158 Ind. 274; *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247; *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569, *contra*.
New Castle Bridge Co. v. Doty, 84, 87 (4).
13. *Instructions.—Duty to Request.—Contributory Negligence.—Evidence.*—If defendant desires the jury to be instructed that they may consider plaintiff's evidence on the question of contributory negligence, it is his duty to request such an instruction.
New Castle Bridge Co. v. Doty, 84, 88 (5).
14. *Instructions.—Contributory Negligence.—Burden of Proof.*—An instruction, that the burden of proof in a personal injury case is on defendant and defendant must establish same by a preponderance of the evidence, though erroneous, is not reversible where the court further instructed that if the jury find that the plaintiff was guilty of any contributory negligence he cannot recover.
Evansville, etc., R. Co. v. Mills, 598, 607 (8).
15. *Instructions.—Burden of Proof.—Clerical Errors.*—Where the trial court in a misdemeanor case gave an instruction that the burden of proof was on "defendant" to prove every material allegation of the indictment beyond a reasonable doubt, but in other instructions the court properly instructed the jury that the State must establish its case, such clerical error is harmless.
White v. State, 95, 100 (2).
16. *Instructions.—Clerical Omissions.*—An instruction charging the jury in a criminal case that it was for them to "determine what has been proved and what has been proved on the trial" is not harmful to defendant since the omission of the word "not" could not be misleading.
White v. State, 95, 102 (5).

TRIAL—Continued.

17. *Instructions.—Clerical Omissions.*—An instruction charging the jury in a criminal case that "this is a prosecution * * * charging the defendant, Henry White, keeping and exhibiting a gaming device" is not reversible because of the clerical omission of the word "with" preceding the word "keeping," no injury being shown. *White v. State*, 95, 102 (6).
18. *Instructions.—Criminal Law.—Consideration of Evidence.*—Where the trial court instructed the jury in a criminal case that the presumption of innocence prevails until the close of the trial, and the jury should weigh the evidence in the light thereof and reconcile the proof with such presumption if it could be done consistently with the law and the evidence and "your duty as jurors," such last clause does not constitute reversible error by placing on the jury a duty unauthorized by law. *White v. State*, 95, 101 (4).
19. *Criminal Law.—Instructions.—Intent.*—In a prosecution for assault and battery with intent to commit murder, where defendant was acquitted of such intent, it is unnecessary to consider instructions solely on such question. *Guy v. State*, 691, 696 (4).
20. *Criminal Law.—Instructions.*—It is not erroneous to charge the jury in a criminal case that if they find all of the essentials of the crime charged proved beyond a reasonable doubt they should find defendant guilty. *Guy v. State*, 691, 696 (5).
21. *Instructions.—Criminal Law.*—Under subdivision six, §260 of the act of 1905 (Acts 1905, p. 641) all special instructions in a criminal case shall be in writing without oral modifications or explanations. *Guy v. State*, 691, 696 (8).
22. *Instructions.—Damages.—Elements.—Interurban Railroads.*—Where the court properly instructed the jury as to the elements of damage in condemning an interurban railroad right of way over lands, the fact that such instruction included as a basis for damage "any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises," does not constitute reversible error. *Indianapolis, etc., Traction Co. v. Dunn*, 248, 251 (6).
23. *Evidence.—Peremptory Instructions.*—In granting a peremptory instruction for defendant the trial court can consider only the evidence and inferences favorable to plaintiff and must treat the evidence favorable to defendant as withdrawn. *Roberts v. Terre Haute Electric Co.*, 664, 671 (3).
24. *Instructions.—How Considered.*—Instructions should be considered as an entirety and if they fairly present the case to the jury, no reversible error is committed. *Posey County Fire Assn. v. Hogan*, 573, 582 (9).
25. *Instructions.—Requisites.*—Instructions should briefly, plainly and concisely state the law applicable to the evidence as viewed upon the theories of plaintiff and defendant. *Clear Creek Stone Co. v. Carmichael*, 418, 418 (4).
26. *Instructions.—How Considered.*—Instructions must be considered as an entirety, and if they fairly state the law of the case, there is no reversible error. *Southern Ind. R. Co. v. Baker*, 405, 412 (8).

TRIAL—Continued.

27. *Instructions.—How Considered.*—The court is not required to state in one instruction the complete law of the case, but if the instructions considered in their entirety fairly present the case to the jury, there is no available error.
White v. State, 95, 101 (3).
Allyn v. Burns, 223, 229 (5).
28. *Instructions.—Applicability of, to Pleadings and Evidence.*—Instructions requested must be shown to be applicable not only to the pleadings but also to the evidence.
Allyn v. Burns, 223, 227 (1).
29. *Instructions.—Refusal to Give.—Answers to Interrogatories.—Harmless Error.*—The refusal to give a requested instruction is harmless where the answers to the interrogatories to the jury show the facts assumed therein are true.
Huntington Light, etc., Co. v. Beaver, 4, 15 (10).
30. *Instructions.—Covering Only Branch of Case.*—The trial court may, in an instruction, set out the contentions of parties on a single branch of the case without including the contentions in the whole case.
Huntington Light, etc., Co. v. Beaver, 4, 14 (8).
31. *Instructions.—Answers to Interrogatories.*—Where the answers to the interrogatories to the jury show that appellant was not injured by the giving or refusal of instructions, the judgment will not be reversed, though the court's rulings were erroneous.
Muncie Pulp Co. v. Hacker, 194, 209 (11).
32. *Inapplicable Instructions.—Effect.*—An instruction, though erroneous, stating a general proposition of law inapplicable to the case, where the court does not apply it to the facts of the case, is harmless.
Muncie Pulp Co. v. Hacker, 194, 208 (7).
33. *Instructions.—Factory Act.—Including Alleged Negligent Acts Conjunctively.*—An instruction in an action for damages on account of defendant's violation of the factory act (§7087i Burns 1901, Acts 1899, p. 231, §9) stating that if the jury find that defendant failed properly to guard an emery-wheel, and failed to provide exhaust-fans, and failed to provide any shield or protection for the eyes, such failure would be negligence, is erroneous in requiring plaintiff to prove three acts of negligence, one only being necessary; but defendant cannot complain thereof.
Muncie Pulp Co. v. Hacker, 194, 206 (5).
34. *Instructions.—Invasion of Province of Jury.—Railroads.—Signals.*—An instruction that if defendant railroad company's automatic bell did not sound at the highway crossing decedent had a right to presume the way was clear is an invasion of the province of the jury.
Southern Ind. R. Co. v. Corps, 586, 594 (9).
35. *Instructions.—Invasion of Province of Jury.*—An instruction that "there is some proof tending to show" a certain fact does not invade the province of the jury by leading the jury to believe such fact to be proved.
Huntington Light, etc., Co. v. Beaver, 4, 15 (9).
36. *Instructions.—Negligence.—Shortening Life.—Damages.*—An instruction that the jury may consider the shortening of plaintiff's life by reason of the alleged negligence for the purpose of determining the extent of his injuries, the consequent disability to make a living, and the mental and bodily suffering

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- which may result, but not to grant damages therefor, is not erroneous. *Muncie Pulp Co. v. Hacker*, 194, 208 (8).
37. *Instructions.—Answers to Interrogatories.—Negligence.*—Where defendant requested an instruction that if there were two ways to do a thing, one safe, the other dangerous, and plaintiff chose the dangerous way, he was negligent and cannot recover, which instruction was refused, the jury's answer to an interrogatory, upon conflicting evidence, that the way followed by plaintiff was the right way to do the work, renders such refusal harmless. *Muncie Pulp Co. v. Hacker*, 194, 209 (10).
38. *Instructions.—Railroads.—Conductors.—Engineers.—Negligence.*—An instruction that conductors and engineers of a railroad train are made vice-principals by statute, and an injury to plaintiff through a collision caused by the negligence of one or both of such officials, where the plaintiff was without fault, renders such railroad company liable, is not objectionable. *Southern Ind. R. Co. v. Baker*, 405, 412 (7).
39. *Instructions.—Carriers.—Passengers.—Ejection.—Unnecessary Force.*—An instruction that the carrier is liable for the use of unnecessary force in the ejection of a passenger is within the issues where one paragraph of the complaint alleges an assault and battery upon plaintiff after presentation of his ticket, and another paragraph, before time was given for a presentation of his ticket, especially where the jury was further instructed that a passenger must not only have his ticket but must tender it when demanded. *Terre Haute, etc., R. Co. v. Pritchard*, 420, 422 (1).
40. *Instructions.—Master and Servant.—Railroads.—Care.*—An instruction that a railroad company owes its engineer the duty to keep its switches, targets, locks and appliances in good repair, "so that it will be safe for its employes to discharge their duties," is erroneous, reasonable care only being required. *Cleveland, etc., R. Co. v. Snow*, 646, 652 (5).
41. *Instructions.—Sales.—Conditional.—Return.*—An instruction refused, that if defendant did not return a wind pumping outfit within a reasonable time his right to return same would be forfeited and the sale would be absolute, is not applicable where the evidence showed that plaintiff was to retake such outfit if, on a sixty-day trial, it did not satisfy defendant. *Allyn v. Burns*, 223, 227 (2).
42. *Instructions.—Witnesses.—Evidence.—Weight.*—An instruction that the jury might consider whether witnesses in a condemnation case were practical farmers or mere landowners but that the weight to be given to such facts was for them alone, is not an invasion of the province of the jury. *Indianapolis, etc., Traction Co. v. Dunn*, 248, 253 (8).
43. *Instructions.—Credibility of Witnesses.—Invasion of Province of Jury.*—The weight and credibility of testimony are questions exclusively for the jury, and an instruction stating that some testimony is of greater weight than other testimony is an invasion of the province of the jury. *Muncie, etc., R. Co. v. Ladd*, 90, 93 (1).
44. *Instructions.—Credibility of Witnesses.—Interest.—Invasion of Province of Jury.—Curing Error.*—An instruction that "as a general rule a witness who is interested in the result of a

TRIAL—Continued.

suit will not be as honest, candid and fair in his testimony as one who is not interested" is an invasion of the province of the jury, and such error is not cured by a further statement in such instruction that "the degree of credit to be given to each and all of the witnesses is a question for the jury alone to determine."

Muncie, etc., R. Co. v. Ladd, 90, 94 (2).

45. *Insurance. — Mutual Benefit. — Payment for Assured.* — An allegation in a complaint, that assured, a member of a mutual benefit insurance association, performed all of the conditions on his part to be performed, is proved by evidence showing that such things were performed by others for him.

Grand Lodge, etc., v. Hall, 371, 372 (3).

46. *Interrogatories to Jury. — Nature of.* — An interrogatory to the jury asking upon what paragraph of complaint damages are awarded is improper.

American Quarries Co. v. Lay, 386, 393 (8).

47. *Interrogatories to Jury. — Answers. — Contradictions. — Effect. — General Verdict.* — Contradictory answers to interrogatories to the jury nullify each other, and the general verdict stands unless the answers are in irreconcilable conflict therewith.

Cincinnati, etc., St. R. Co. v. Klump, 660, 663 (5).

48. *Interrogatories to Jury. — Interurban Railroads. — Issues.* — Interrogatories requiring the jury to state in detail whether the motorman of the colliding car failed to do anything he could have done to avert such collision are properly refused where the issue was negligence in operating the car at an excessive speed.

Cincinnati, etc., St. R. Co. v. Stahle, 539, 545 (10).

49. *Interrogatories to Jury. — Right of Counsel to Discuss.* — Counsel have the right to discuss interrogatories submitted to the jury and to argue that certain facts inquired about are established by the evidence in a certain way.

Clear Creek Stone Co. v. Carmichael, 413, 419 (6).

50. *Quieting Title. — Interrogatories to Jury. — Conflict. — Notice.* — In a suit by heirs to quiet their equitable title to real estate, an answer to an interrogatory to the jury, that defendant, who was husband of the holder of the legal title, did not know, when his wife made certain improvements thereon, that her grantor held such property in trust for her and plaintiffs, is not in conflict with a general verdict for plaintiffs, since it does not negative notice sufficiently to put defendant upon inquiry.

Catterson v. Hall, 341, 349 (4).

51. *Answers to Interrogatories to Jury. — Judgment non Obstante on Certain Answers.* — Judgment non obstante cannot be rendered on certain interrogatories to the exclusion of the others, but all must be considered.

Catterson v. Hall, 341, 346 (1).

52. *Quieting Title. — Interrogatories to Jury. — Conflict.* — In a suit by heirs to quiet their equitable title to real estate, an answer to an interrogatory to the jury, that such land was of the value of \$600 before any improvements were added by the holders of the legal title, is not in conflict with a general verdict for plaintiffs.

Catterson v. Hall, 341, 349 (3).

53. *Interrogatories to Jury. — Railroads. — Wrongful Refusal to Honor Ticket.* — Answers to the interrogatories to the jury, that plaintiff offered to the agent of the issuing railroad company identification that he was the original purchaser of his

TRIAL—Continued.

ticket only by his signature, do not control a general verdict for plaintiff, where plaintiff was prevented by such agent from offering further means of identification.

Pittsburgh, etc., R. Co. v. Coll, 232, 238 (4).

54. *Answers to Interrogatories.—Gas Explosions.*—Where the answers to interrogatories to the jury show that defendant gas company turned on the tenant's gas, discovered a leak, failed to turn off the gas, notified tenant to let it alone and defendant would repair it, and that the owner's plumber, without the tenant's knowledge, undertook to repair the plumbing, and in doing so ignited the gas, injuring tenant, the general verdict for tenant is not thereby overthrown.

Huntington Light, etc., Co. v. Beaver, 4, 13 (5).

55. *Answers to Interrogatories.—Failure to Show by Whom Gas Was Ignited.*—Where the answers to interrogatories to the jury show that defendant gas company negligently failed to turn off the gas after discovering a leak, a failure by the tenant to prove who ignited the gas, which exploded and caused tenant's injuries, does not overthrow a general verdict in tenant's favor. *McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, distinguished. *Huntington Light, etc., Co. v. Beaver*, 4, 13 (6).

56. *Conclusions of Law.—Gaming.—Judgment for State.—Collection by Wife.*—Conclusions of law, in a suit by the wife for the enforcement in her favor of a judgment in favor of the State in an action by the State to recover her husband's money lost at gambling, that there is due the wife the amount evidenced by such judgment, is correct.

Tyler v. Davis, 557, 570 (12).

57. *Special Findings.—Deeds.—Escrow.—Delivery.*—The delivery of a deed held in escrow is an ultimate fact to be found in terms by the court; and to constitute a delivery there must be an intentional parting with the title.

Corr v. Martin, 655, 659 (3).

58. *Special Findings.—Evidentiary Facts.—Appeal and Error.*—Where the special finding of facts contains the facts material to the issue mingled with others immaterial or evidentiary, the judgment will not be disturbed on appeal where the material facts found support such judgment.

Tyler v. Davis, 557, 569 (9).

59. *Special Findings.—Inferences.*—Trial courts are permitted to draw reasonable inferences from facts proved, and special findings embodying facts so inferred are legally sustained by the evidence.

Tyler v. Davis, 557, 569 (10).

60. *Special Findings.—Motions to Make Additional.—New Trial.*—Motions that the trial court make additional special findings are not recognized by the Indiana procedure, the remedy being a motion for a new trial.

Tyler v. Davis, 557, 570 (11).

61. *Venire de Novo.*—Where the special findings fully cover the facts in issue, a motion for a *venire de novo* should be overruled.

Indiana Rolling Mill Co. v. Gas Supply, etc., Co., 154, 160 (3).

62. *Motions.—Venire de novo.*—Where the special findings follow the theory of a sufficient complaint, and contain the material facts therein alleged, a motion for a *venire de novo* because of defects therein should be overruled.

Case v. Collins, 491, 505 (5).

TRIAL—Continued.

63. *Motions.—Venire de novo.*—A motion for a *venire de novo*, as applied to a general verdict, questions only such defects as appear upon the face of the record.
Douglas v. Indianapolis, etc., Traction Co., 332, 335 (1).
64. *Motions.—Venire de Novo.—Reasons.—Appeal and Error.*—A motion for a *venire de novo*, oral or written, must disclose the reasons therefor, and such reasons must be shown by the record. *Swift v. Harley*, 20 Ind. App. 614, limited.
Douglas v. Indianapolis, etc., Traction Co., 332, 336 (3).
65. *General Verdict.—Effect.*—A general verdict for plaintiff establishes all facts necessary to a recovery in his favor, and establishes all facts against defendant necessary to a recovery on his cross-complaint. *Catterson v. Hall*, 341, 347 (2).
66. *Finding.—Deeds.—Delivery.*—A general finding for plaintiff on a cross-complaint asserting the validity of a deed includes a finding of delivery. *Fifer v. Rachels*, 275, 277 (3).
67. *Leases.—Gas and Oil.—Release.—Evidence.*—An answer to a complaint for the enforcement of the provisions of a gas-and-oil lease, that defendant had released a portion of such tract in writing and therefore owed plaintiff nothing is not supported, where the evidence showed a release signed by some person not shown to have authority from defendant, that plaintiff refused such release and that the lease granted an interest in real estate, since the release, even if authorized, did not amount to a reconveyance. *Ramage v. Wilson*, 532, 538 (4).
68. *Negligence.—Contributory.—Defense.*—The plaintiff in a personal injury case, under the act of 1899 (Acts 1899, p. 58, §359a Burns 1901) has established his case when he has proved defendant's negligence and proximately resultant injuries to himself. *New Castle Bridge Co. v. Doty*, 84, 86 (1).
69. *Contributory Negligence.—Question for Jury.—Appeal and Error.*—Contributory negligence is primarily a question for the jury, and where there is any evidence tending to support their verdict it will not be disturbed on appeal.
Cincinnati, etc., St. R. Co. v. Stahle, 539, 546 (11).
70. *Contributory Negligence.—How Proved.*—Contributory negligence in personal injury cases is a defense which may be proved under the general denial, and defendant is entitled to have all evidence introduced by plaintiff on such issue considered. *Roberts v. Terre Haute Electric Co.*, 664, 671 (5).
71. *Railroads.—Contributory Negligence.—Question for Jury.*—Where the evidence shows that defendant railroad company's automatic bell at a highway crossing did not ring, and decedent approached such crossing without stopping, relying upon the ringing of such bell at the approach of the train, the question of contributory negligence in view of the dangers is properly left to the jury. *Southern Ind. R. Co. v. Corps*, 585, 593 (7).
72. *Negligence.—Several Acts Alleged.—Proof of One.*—Where several negligent acts are alleged, proof of one is sufficient to establish the case. *Muncie Pulp Co. v. Hacker*, 194, 207 (6).
73. *Negligence.—General Verdict.—Effect.*—A general verdict for plaintiff in a negligence case is a finding that the negligence complained of was a proximate cause of the injuries.
Cleveland, etc., R. Co. v. Patterson, 617, 624 (8).

TRIAL—Continued.

74. *Interurban Railroads.—Backing Car over Streets without Lookout.—Negligence.—Question for Jury.*—The court cannot, as a matter of law, hold that an interurban railway company, in backing a freight-car, without any lookout, around a corner and over a much frequented crossing, thereby injuring a minor twelve years old while attempting to cross ahead of such car, is not guilty of negligence, such question being for the jury.
Roberts v. Terre Haute Electric Co., 664, 671 (4).
75. *Quieting Title.—Fraud.—Interrogatories to Jury.—Conflict.*—In a suit by heirs to quiet their equitable title to real estate, an answer to an interrogatory to the jury, that the jury did not know that the ancestor had no intention to defraud his creditors when he conveyed the property to a legal holder, through whom defendant claims, is not in conflict with a general verdict for plaintiffs, being a negation of a fact, the law requiring an affirmation.
Catterson v. Hall, 341, 349 (5).
76. *Carriers.—Passengers.—Ejection.—Pleading.—Evidence.*—Where a complaint alleges that the conductor of defendant company's train forcibly ejected plaintiff and in so doing greatly bruised plaintiff about the head, face and body, evidence that plaintiff's ear drum was injured, and his hearing impaired is admissible.
Terre Haute, etc., R. Co. v. Pritchard, 420, 423 (2).
77. *Railroads.—Collisions.—Question for Jury.—Evidence.*—Where the evidence showed that plaintiff, a live-stock attendant on a freight-train, was injured while his car was standing on the track, by a terrible jar which threw him against the car rendering him unconscious, the question whether such jar was caused by defendant company was for the jury.
Evansville, etc., R. Co. v. Mills, 598, 603 (3).
78. *Railroads.—Passengers.—Injuries.—Res Ipsa Loquitur.*—Injury to plaintiff while a passenger for hire on defendant's railroad establishes a *prima facie* case of negligence, and the defendant, to escape liability, must show that such injury could not have been avoided by the highest practical care.
Evansville, etc., R. Co. v. Mills, 598, 604 (5).
79. *Pleading.—Proof.—Variance.*—Plaintiff must recover *secundum allegata et probata*.
Evansville, etc., R. Co. v. Mills, 598, 602 (2).

TRUSTEE—

See TOWNSHIP TRUSTEE.

TRUSTS—

- County auditor is not trustee of, in drainage contracts, see PLEADING, 26; *State, ex rel., v. Karr*, 120, 122 (2).
- Complaint for recovery of trust funds, see PLEADING, 68; *Case v. Collins*, 491, 500 (3).
- Resulting.—Deeds.—Parol Contracts.—Statutes.*—Where the purchaser of real estate pays the consideration therefor and by a parol contract the deed therefor is taken in the name of another in trust for the purchaser, a resulting trust is thereby created under §3898 Burns 1901, §2976 R. S. 1881.
Catterson v. Hall, 341, 350 (6).

ULTRA VIRES—

See CORPORATIONS.

USURY—

Complaint for recovery of, see PLEADING, 69; *Gilman v. Fultz*, 609, 611 (2).

VARIANCE—

Between pleading and proof, fatal, see TRIAL, 79; *Evansville, etc., R. Co. v. Mills*, 598, 602 (2).

VENDOR AND PURCHASER—

Vendee holds in trust when he purchases for another with such other's money, see TRUSTS; *Catterson v. Hall*, 341, 350 (6).

VENIRE DE NOVO—

See TRIAL, 61-64.

VERDICT—

General verdict establishes all necessary facts, see TRIAL, 65; *Catterson v. Hall*, 341, 347 (2).

General, shows that negligence alleged was proximate cause, see TRIAL, 73; *Cleveland, etc., R. Co. v. Patterson*, 617, 624 (8).

WAIVER—

Of questions on appeal by failure to file proper brief, see APPEAL AND ERROR, 11-22.

Failure to move to dismiss appeal until after filing brief is not a waiver of such right where the assignment of errors presents no question, see APPEAL AND ERROR, 63; *Hayes v. Locus*, 104.

Full appearance is waiver of service, see JUDGMENT, 10; *Douglas v. Indianapolis, etc., Traction Co.*, 332, 339 (8).

Of incompetency of physician by insurance application, see EVIDENCE, 24; *Metropolitan Life Ins. Co. v. Willis*, 48, 53 (4).

Mortgagee waives right to share in decedent's personal property by failing to file mortgage, see DESCENT AND DISTRIBUTION, 2; *St. Joseph County Sav. Bank v. Randall*, 402, 404 (2).

An exception to conclusions of law on special findings including an essential fact omitted from the complaint to which no demurrer was filed, should be a waiver of the right to make an initial attack on such complaint on appeal, see APPEAL AND ERROR, 64; *Coulter v. Bradley*, 697, 698 (1).

WARRANTY—

In insurance application, see INSURANCE, 10, 11; *Metropolitan Life Ins. Co. v. Willis*, 48.

WILLS—

Not foundation of a suit for partition, see PLEADING, 70; *Shetlerly v. Art*, 687, 688 (1).

Legacies may be applied on legatee's debt to the estate, see DESCENT AND DISTRIBUTION, 5; *Weaver v. Gray*, 35, 42 (4).

WITNESSES—

Incompetency may be waived by contract, see EVIDENCE, 24; *Metropolitan Life Ins. Co. v. Willis*, 48, 53 (4).

Weight to be given to evidence of, for jury alone, see TRIAL, 42-44.

WITNESSES—Continued.

State may subpoena and compel attendance of, though names are not indorsed on indictment, see **CRIMINAL LAW**, 10; *Cameron v. State*, 381, 383 (2).

Administrator, competent to testify where decedent's property was found after his death, see **EVIDENCE**, 23; *Hartzell v. Hartzell*, 481, 486 (4).

WORDS AND PHRASES—

See **MAXIMS**.

"During disability," time covered by, a question for the jury, see **CONTRACTS**, 11; *American Quarries Co. v. Lay*, 386, 392 (7).

"Dust"—what constitutes, as used in factory act, see **STATUTES**, 11; *Muncie Pulp Co. v. Hacker*, 194, 205 (4).

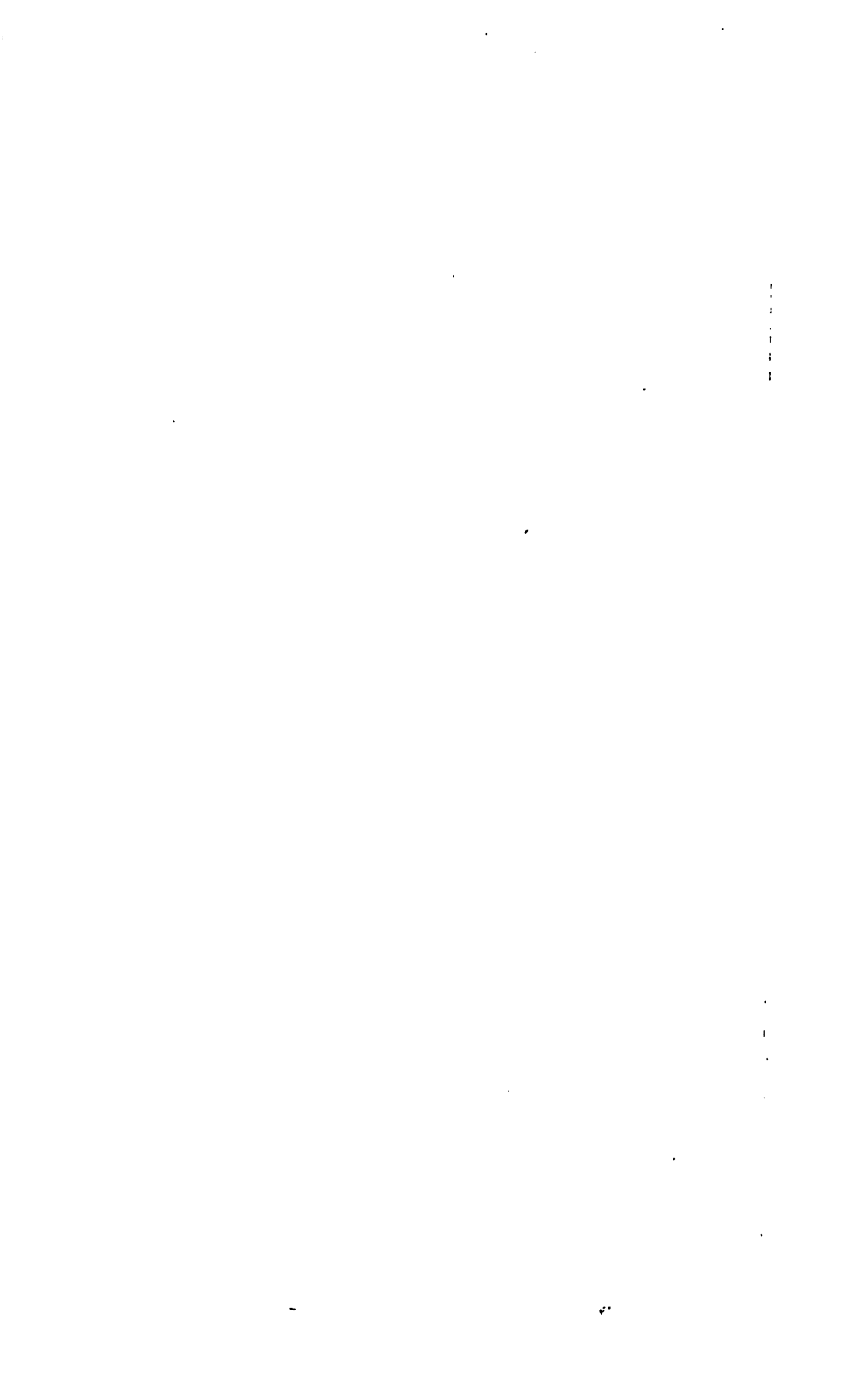
"Executed" implies "delivered," see **PLEADING**, 50; *Embree v. Emerson*, 16, 21 (3).

"Sidewalks" means foot way along the side of a street, see **MUNICIPAL CORPORATIONS**, 5; *Marion Trust Co. v. City of Indianapolis*, 672, 677 (3).

"Acknowledge."—The word "acknowledge" means to admit, to own, to confess or to recognize a truth or fact.

Townsend v. Menesley, 127, 131 (4).

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